IDAHO LAW REVIEW

VOLUME 8 SPRING 1972 NUMBER 2

THE MODEL PENAL CODE IN IDAHO?

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INTRODUCTION

One of the problems necessarily incident to publication of any article on a topic of current concern is the possibility that no sooner than the printer's ink has dried, the subject matter originally contemplated will have been greatly altered or amended by a rapid change of time and circumstance. This article, originally intended to assist the bench and bar of this state in understanding the changes in concept and terminology brought about by the adoption of Idaho's version of the Model Penal Code, proved to be no exception. In what most observers would have to concede was an "extraordinary" maneuver, the 1972 Idaho legislature repealed the new "Penal and Correctional Code" after it had been in effect for only two months.

The real reason for this rather circular chain of events is not clear. Certainly Idaho's criminal code was in need of revision, much of its skeleton remaining from the year of its original adoption in 1864. Surely the piece-meal legislation which had evolved since 1864 to remedy the year to year ills of an expanding population was not successful in eliminating archaic terminology and inadvertent conflicts in policy. To the contrary, the criminal code reflected but a collection of unorganized statutes, collected under a single title of the Idaho Code, from which only those trained in the law could extract meaning, and only those skilled in its everyday practice could manipulate.

Whatever the real reason for this exceptional course of action taken by the Idaho legislature, there is one thing that is certain. Idaho must continue in its quest for penal reform. Every effort must be made to mold competing policies, priorities and precedent into a viable criminal code capable of dealing with twentieth century problems. This article is now submitted with the hope that the summary which it provides will be of some assistance in the fulfillment of these objectives.

The method employed in presenting this material has been to follow the scheme of classification used in the Model Penal Code. Every effort has been made to contrast the provisions of the Model Penal Code with the common law and former Idaho statutes. Modifications enacted in the "Penal and Correctional Code" (the name given to Idaho's initial version of the Model Penal Code) and suggested amendments thereto have been included.

It should be noted that for purposes of simplification, all portions of the M.P.C. which were in effect from January 1, 1972, until the effective date of repeal on April 1, 1972, have been cited as the "Code," together with its assigned Idaho Code section number. The "present" Idaho

criminal code, assuming it will be re-enacted in substantially the same language as it appeared prior to the adoption of the Penal and Correctional Code, has been cited as the "former" Idaho Code. Of course, should the legislature make any material modifications while re-enacting the former code, this material should also be consulted. Finally, it should be pointed out that this article is not intended as an exhaustive treatment, nor a restatement of the statutes as enacted. Therefore reference to the appropriate statutory material is recommended.

I. GENERAL POLICY

The Model Penal Code was formulated under the auspices of the American Law Institute. Approved by the Institute in 1962, it represents the culmination of ten years labor by some of America's most renowned experts in the areas of legislative reform and criminal law.[1] As such, it represents the first practical working "model" for criminal code reform to be developed in the last fifty years.[2] In short, it offered re-organization, substantive alterations and a comprehensive and complete statement of the law from which the various states could accomplish revision of their criminal codes.[3] Idaho's Penal and Correctional Code is one such attempt at revision.

The general purposes for which the Code was enacted are set forth in Code 18-102. Reduced to other terms, these purposes reflect three general policy considerations: 1) the deterrence of potential criminals for the protection of society and the incapacitation and correction of the individual offender; 2) protection of the offender from excessive, disproportionate or arbitrary punishment while informing him of the nature of the sentences that may be imposed upon conviction; and 3) a recognition of the philosophy that correction and rehabilitation of offenders has redeeming social value in addition to the prevention of crime.

In an effort to harmonize these goals, the authors of the Code have

[1]Included among the members of the reportorial staff were such notables as Herbert Wechsler of the Columbia Univ. School of Law; Louis Schwartz of the Univ. of Pennsylvania School of Law; Sanford Bates, Francis Allen, Thorsten Sellin, Yale Kamisar and Glanville Williams to name just a few. The Advisory Committee also included such individuals as Dr. Lawrence Freedman, Professor of Psychiatry at the University of Chicago; the late Learned Hand; Judge Stanley Fuld of the New York Court of Appeals; Henry Hart of Harvard; and John Waite of the University of Michigan. For a complete list *see* MODEL PENAL CODE at *iv* (Proposed Official Draft, 1962).

[2]Israel, *The Process of Penal Law Reform—A Look at the Proposed Revised Criminal Code,* 14 WAYNE LAW REVIEW at 773,n. 8.

[3]Over one-half the states have undertaken substantial revisions of their criminal codes during the past decade. *See,* A Report by the President's Commission on Law Enforcement and Administration of Justice, the Challenge of Crime in a Free Society 126 (1967); *see also,* Robinson, Revisionists of the States Unite, 5 AMERICAN CRIMINAL LAW QUARTERLY 178 (1967).

in some instances re-organized the criminal law and promulgated new procedures for its administration. For instance, in contrast to the usual felony-misdemeanor dichotomy, crimes are now classified as felonies, misdemeanors, petty misdemeanors and "violations" [Code 18-104]. Felonies are further classified as felonies of the first, second or third degrees [Code 18-2201]. Thus, instead of having a classification based primarily upon the elements of the crime, the classification is primarily based upon the degree of punishment. Furthermore, even though sentencing is in accord with these degrees, there are provisions of the Code which allow the court more flexibility in sentencing the individual defendant than has heretofore been the case.

The Code has also undertaken the difficult task of providing adequate definition of the various criminal offenses. Just as the attempt to define felonious crimes in relationship to specific categories has led to elimination of some of the burdensome legislation dealing with detail, these definitions attempt to reduce and define some of the abtract and long-standing terminology that has previously encrusted the criminal code. In some instances, this is nothing more than an exercise in semantics, but in others, the Code utilizes new concepts with attendant possible sources of confusion. Leaving behind certain well-established concepts runs the risk that new definitions may not be absolutely precise, putting lawyers and judges in the position of seeking an anchor with which to tie the legal ship. It is to be expected that the past will not be forgotten, and that the large body of common law accumulated over a millenium (of which former Idaho criminal law was a direct offshoot) will likely provide the anchor students of law may at times desire.

II. OFFENSES AGAINST THE PERSON

A. CRIMINAL HOMICIDE

1. General

The Code classifies criminal homicide as murder, manslaughter or negligent homicide. This classification corresponds with that adopted by former IDAHO CODE §§ 18-4001 and 18-4006, which divided criminal homicide into two catgories, murder and manslaughter. The latter was then further divided into voluntary and involuntary manslaughter, the difference being in the circumstances surrounding the commission of the offense and the punishment accorded upon conviction. There was also a negligent homicide concept in old IDAHO CODE § 18-4006. Thus, in effect, the former Idaho law contained the same general classification scheme as does the Code.

The usual definition accorded the term "homicide" is the killing of one human being by another human being.[4] A proper discussion of this definition in the criminal context would have to include discussion of the elements of causation, justification and excuse. The Code's definition of criminal homicide is given in Code 18-602. A person is therein stated to be guilty of criminal homicide when he "knowingly, purposely, recklessly, or negligently" causes the death of another. The quoted terms refer to the mental state that must accompany behavior for it to be denounced as a crime and are defined in Code 18-202 under the title of "General Requirements for Culpability." These definitions do not differ from the interpretation given the terms under present Idaho law. It is noteworthy, however, that the definition of "negligently" in Code 18-202 (2) (d) requires more than the lack of reasonable care that may suffice for civil liability. It requires proof of a "substantial and unjustifiable risk" of causing death such that the actor's failure to perceive the risk constitutes a "gross deviation" from the standard of reasonable care. Plainly, the Code's criminal standard is gross negligence. This represents a change from former IDAHO CODE § 18-4006 which imposed criminal liability for ordinary negligence.

Suicide is not within the definition of criminal homicide under either the Code or former Idaho law. For a discussion of aiding or abetting suicide, see Section II (A) (7) below.

2. Murder

Code 18-603 defines criminal homicide as constituting "murder" when:

a) It is committed purposely or knowingly; or
b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force, threat of force, arson, burglary, kidnapping or felonious escape.[5]

[4]Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958).

[5]Because of the sweeping changes made by the Code, there are some "sleepers" that have already come to light, and, likely, there are more lurking in its pages. For example, Idaho retained capital punishment for murder [I.C. § 18-2202(1)]. In the event of a legal execution, the executioner would commit an act which would be properly called "justifiable murder." *See* PERKINS, CRIMINAL LAW 770 (2nd ed. 1969). Of course, such a concept presents no practical difficulties of administration, but it does require an examination of factors extraneous to the definition of the crime itself. The logical chain is as follows: A person is guilty of criminal homicide (of the species called murder) when he "purposely or knowingly . . . causes the

This definition is in contrast to the common law and former Idaho statutory definition of murder as being the unlawful killing of a human being with malice aforethought [*See* former I.C. § 18-4001]. Traditionally, "malice aforethought" did not require a showing of hatred toward the victim, as a layman might expect, but rather was a term to cover the mental state of the actor. As such, it was express whenever the actor manifested some deliberate intention to kill another, or implied where the circumstances were such that no considerable provocation was present, or where the killer demonstrated an "abandoned and malignant heart" [former I.C. § 18-4002].

The Code substitutes "purposely" and "knowingly," as defined in Code 18-202, to cover the situations formerly within the ambit of express malice. Code 18-603 (1) (b), referring to those homicides committed "recklessly under circumstances manifesting extreme indifference to the value of human life," is the new terminology for those situations covered previously under the term "abandoned and malignant heart." These changes are in accord with the purpose of the Code to eliminate archaic terminology and substitute what the drafters believed was more understandable language.

As the Code will be applied in practice, there probably will be no significant deviations from the former concepts of malice. It is to be expected that the Idaho courts will make liberal use of the older malice cases in determining whether given homicidal acts were done "purposely," "knowingly" or "recklessly."

Illustrative is the recent case of *State v. Gomez*,[6] where the defendant was convicted of second degree murder as a result of a tavern shooting. Defendant contended that the facts did not establish malice, primarily because he had consumed over a dozen beers during the course of the evening, the victim had previously choked him and defendant thought the victim was following him as he left the bar, and because he pointed the gun at the victim only to scare him off and did not intend to pull the trigger and did not remember doing so. The Supreme Court relied on the presumption of malice when a deadly weapon is used in a deadly and dangerous manner. The court said further that the defendant's voluntary intoxication did not make the act any less criminal, but that whether he was so intoxicated as not to be able to formulate the necessary malice was a question for the jury. The court did not decide that the

death of another human being" [I.C. §§ 18-602, 18-603]. This, of course, the executioner would do, but equally obvious is the fact that his action would be authorized and justifiable [*See* I.C. §§ 18-301, 18-303]. The problem of semantics would have been alleviated if the Code had appended to its definition of criminal homicide the words "without justification or excuse." Time and lawyers' ingenuity will tell if such "sleepers" go deeper than mere semantical matters.

[6] — Idaho —, 487 P.2d 686 (1971).

defendant *did* intend to kill the victim, but implied that his manner of use of the weapon could indicate such.

Thus, the defendant's conduct would not appear to have been purposeful under the Code in that it was not his "conscious object" to kill the victim, even though it was his "conscious object" to brandish the gun and threaten the victim with it [Code 18-202 (2)]. However, the defendant did disregard "a substantial and unjustifiable risk" so as to engage in reckless conduct resulting in homicide, which under the Code constitutes the crime of murder just as much as if executed "purposely." [*See* Code 18-202 (2) (c) and 18-603.] A firearm is classed as a "deadly weapon" by the Code [18-601 (4)]. Code 18-208 (1) says that generally "intoxication of the actor is not a defense unless it negatives an element of the offense." More specifically, Code 18-208 (2) says that "when recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial." Thus, the Code would seem to call for the same result as the former law applicable to *Gomez*-type facts. The presumption used by the court could readily be turned from a presumption of malice to a presumption of recklessness.

3. Felony Murder

The Code advances a new approach to the problem of homicides occurring in the course of the commission of felonies. Under the common law, the intent to engage in certain felonies was the same as malice aforethought. Idaho's felony-murder rule was embodied in former IDAHO CODE § 18-4003. It was therein enumerated that arson, rape, robbery, burglary, kidnaping or mayhem were the specified crimes in which a murder of the first degree would result. The Code eliminates arson and mayhem and substitutes felonious escape and rape or deviate sexual intercourse by force or threat of force. However, under Code 18-603 (1) (b), there is only the presumption of extreme recklessness established by the perpetration or attempted perpetration of these enumerated felonious acts. This presumption is rebuttable [Code 18-115 (5)], in which case the act may still be considered reckless and the actor adjudged guilty of manslaughter [Code 18-604 (1) (a)]. In effect, this means that whether the actor's conduct is otherwise felonious is of no consequence beyond the presumption of extreme recklessness and indifference. To this extent the felony-murder rule has been abandoned. Rather it is the expression of "extreme indifference to the value of human life" which constitutes grounds for conviction of murder under 18-603 (1) (b).

4. No Degrees of Murder

Under the Code there are no degrees of murder. The former distinctions between murder of the first and second degree were dependent upon consideration of matters of premeditation and deliberation [former I.C. § 18-4003]. This section, in practice, provided the jury with the alternative of finding the accused guilty without imposing the death penalty, but the standards were extremely confusing and, as a matter of legal mechanics, almost impossible to apply in a consistent fashion from case to case. The courts said no appreciable time was necessary for the deliberation and premeditation, which of course did violence to the common meanings of deliberate and premeditated. Illustrative Idaho cases are *State v. Snowden*[7] (Idaho's last execution), and *State v. Koho*.[8] One court went so far as to say that for second degree murder premeditation was essential, but intent to kill had to be absent.[9] Perhaps such language would fit a situation where a killing was premeditated, but death actually came through conduct evincing an abandoned and malignant heart. At any rate, it illustrates the great confusion (or as Cardozo said, the "mystifying cloud of words") that the Code left behind. The degrees of murder concept served, albeit in a confusing way, as a license for the jury to dispense mercy if they so desired, and often meant the defendant could escape a death sentence. The Code has sought to eliminate the difficult distinctions and yet maintain the virtues of the old system by adopting a more elaborate sentencing procedure in Code 18-607. Under this section, the death penalty has been retained, but the court and jury may consider other mitigating or aggravating circumstances before sentence is imposed. Sentencing is discussed in more detail in section IV below.

Murder is a felony of the first degree.

5. Manslaughter

The classic definition of manslaughter is "the unlawful killing of another without malice aforethought."[10] It necessarily involved either: 1) "hot blood," which stemmed from some provocation sufficient to cause the reasonable man to become aroused to the point where reason was disregarded and homicide resulted before there was time for passion to cool; or 2) the commission of some inherently dangerous unlawful act (other than certain felonies) which resulted in an unintentional homicide; or 3) the commission of any act, even a lawful one, in a criminally negligent manner. Manslaughter of the first type was denominated "vol-

[7]70 Idaho 266, 313 P.2d 706 (1957).
[8]91 Idaho 450, 423 P.2d 1004 (1967).
[9]Commonwealth v. McLaughlin, 293 A. 213 (1928).
[10]*Accord*, IDAHO CODE § 18-4006.

untary" and manslaughter of the other two varieties was referred to as "involuntary" [former I.C. § 18-4006]. In either case, the crime involved circumstances which mitigated against the imposition of the high penalties imposed for murder.

Code 18-604 states that criminal homicide constitutes manslaughter when:

a) it is committed recklessly; or

b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the point of a person in the actor's situation under the circumstances as he believes them to be.

What constitutes "recklessness" is set forth in Code 18-202 (2) (c). Note that this definition requires a substantial and unjustifiable risk of homicide and a gross deviation from the standard of conduct that a law-abiding citizen would observe in the actor's situation, although it does not involve "extreme indifference to the value of human life," which would make the act murder. Manslaughter is founded on advertent criminal negligence rather than inattentive criminal negligence. The latter is separated to form the third classification of "negligent homicide" and is covered in the next section. Thus, the concept that a homicide is by its very nature manslaughter when committed in the perpetration of an unlawful act (the so-called "misdemeanor-manslaughter rule") has been abandoned. Rather, the act must first create a substantial and unjustifiable risk of homicide and then it must be determined whether the act constitutes negligence or recklessness, the latter warranting the manslaughter charge. According to Code 18-202(2)(c), recklessness involves a "conscious disregard" of the risk.

Under the language of subsection (b) of Code 18-604, the interpretation given the traditional elements of "provocation," "heat of passion" and "cooling off period" have been changed. For instance, "extreme mental or emotional disturbance for which there is reasonable explanation or excuse" suggests a circumstance where the actor was in great distress. It provides for expansion of the situations formerly accepted as sufficient provocation. An example is the common law rule that words alone are not sufficient provocation to reduce murder to manslaughter. Under the Code all the circumstances of the confrontation are taken into consideration, and where there is evidence of extreme mental or emotional disturbance, words alone may be sufficient. The standard of the reasonable man is employed to determine the sufficiency of the provocation as well as to determine whether his act was sufficiently

removed from the provocation so as to constitute a relief from tension, but the reasonable man is placed in the actor's situation under circumstances that the actor believed existed. Thus, the Code statement seems to provide more flexibility while stating with greater clarity the elements of the crime. The end result will still be a determination of whether the actor's loss of self-control can be understood in terms that arouse sufficient empathy to call for mitigation of the sentence, but without some of the stiff rules embodied in the common law crime of manslaughter. It should also be noted that the Code redefinition of manslaughter greatly changes and simplifies the concepts of vehicular and hunting accident homicides. [See paragraph I.A. 6 below.]

Manslaughter is declared to be a felony of the second degree.

6. Negligent Homicide

Code 18-605, a new provision of the Code, treats the crime of negligent homicide. This section incorporates those homicides which result from acts, lawful or unlawful, which involve a gross deviation from the standard of care that a reasonable person would observe in the actor's situation. Idaho formerly included crimes of this nature within the complex definition of involuntary manslaughter [former I.C. § 18-4006]. Basically, this section was directed toward homicides resulting from the negligent operation of motor vehicles and hunting "accidents." Since studies have indicated that convictions for manslaughter have been relatively few in number with regard to this type of offense, the Code defines an alternative crime with a nomenclature of lesser social impact than "murder" or "manslaughter." However, even with the third degree felony classification accorded negligent homicide by the Code, the actual punishment that may be imposed under the new law does not seem to differ significantly from that under the former Idaho statutes.[11]

It is one purpose of the Code to establish an offense which avoids complicated distinctions that reflect primarily on the severity of the sentence the courts are willing to impose. Clarification of the elements of the crime is a second objective. The wording of this particular statute allows the court to analyze the evidence and determine whether the offense amounts to recklessness, or negligence as defined in Code 18-202. Thus, the flexibility that is promulgated by the Code is achieved without the addition of exceptions or distinctions unsupported by principled rationale. For examples of difficulties encountered under the old law, see *State v. Long*,[12] and *State v. Brinton*.[13]

[11] *Compare* IDAHO CODE § 18-4007 with the discussion *infra* on sentencing [I.C. § 18-2202, *et seq.*]

[12] 91 Idaho 436, 423 P.2d 858 (1967).

[13] 91 Idaho 856, 433 P.2d 126 (1967).

One point of possible confusion concerns the comparison of this section with the Idaho statute in existence before the enactment of former IDAHO CODE § 18-4006 (2) (involving manslaughter). This former statute, characterized as "negligent homicide," was phrased in terms of reckless disregard for the safety of others while in the operation of a motor vehicle. This language would seem to be equivalent to the Code's definition of "recklessness" as used in Code 18-202. Such is not the case, however. The offenses covered under the old statute would fall rather under the new offense of negligent homicide. Thus, the term "reckless disregard" under the old statute corresponds more properly with "gross negligence" under former IDAHO CODE § 18-4006 (2) and under Code 18-605.

As stated above, negligent homicide is a third degree felony [Code 18-605 (2)].

7. Suicide

Under the early common law, suicide was a felony, "punished" by ignominious burial and forfeiture of all property. An unsuccessful attempt at self-destruction was punishable as a misdemeanor. In addition, a person who solicited or encouraged another to commit suicide was guilty of the felony as a principle in the second degree if present, and as an accessory before the fact if not present when the fatal act was committed. Thus, if two persons entered into a suicide pact and one person failed to kill himself, the survivor would be guilty of murder of the deceased.[14]

Prior to the enactment of the Code, Idaho had no specific provisions for those causing suicide. However, under Code 18-606, a person who causes another to commit suicide by force, duress or deception is guilty of either murder or manslaughter, depending upon the circumstances. Should a person knowingly or purposely aid or solicit another to commit suicide, and the suicide is attempted, or results by reason of such aid or solicitation, the actor is guilty of a separate offense, a felony of the second degree. Where no suicide or attempt occurs, or where the casual relationship is not present, the same person would be guilty of a misdemeanor. It is also noteworthy concerning suicide that ineffectual aid or solicitation is deemed by the authors of the Code to be less dangerous than solicitation of criminal behavior against others. This is founded on the instinct of self-preservation. Since it is expected that a person could more easily be solicited to harm others than himself, mitigation for this offense is considered warranted.[15]

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[14] *See* PERKINS, CRIMINAL LAW 82 (2d ed. 1969).

[15] *Compare* the grading of offenses in IDAHO CODE § 18-505 (criminal solicitation) and IDAHO CODE § 18-606(2) (soliciting suicide).

B. ASSAULT and BATTERY

Under the common law and the former Idaho statutes, "assault" was defined as the unlawful attempt to harm another with force or violence. Where such force was willfully and unlawfully applied to another, it constituted a "battery." Essential elements of the crime included a criminal intent, which could be implied from criminally negligent conduct, and in Idaho, an apparent present ability to inflict such harm. Under former IDAHO CODE § 18-907, any assault perpetrated with intent to commit rape, robbery, grand larceny, mayhem or the infamous crime against nature constituted a separate crime of aggravated assault punishable by a maximum of fourteen years imprisonment. This statute unfortunately led to confusion with the provisions concerning attempts to commit particular crimes. For example, in *State v. Hall*,[16] the offense of attempted rape was deemed a lesser included offense within the charge of assault with the intent to commit rape. This was true even though the sentence for attempted rape had a potentially higher maximum penalty. The same result could occur when any of the other enumerated crimes were attempted.

It is the approach of the Code to incorporate the crime of battery within the confines of Code 18-702, entitled "assault." This approach is a frank recognition of what had almost universally been the informal characterization; except in textbooks and statutes there was seldom mention of the crime of "battery." The following is a breakdown of the various grades of this offense under the Code:

1) Simple Assault_____where the attempt or resulting bodily injury does not involve serious injury.[17] The offense is a misdemeanor (1 year maximum), except in those cases where mutual consent is involved, when it is a petty misdemeanor [Code 18-702(1)].

2) Aggravated Assault__where the attempt or harm inflicted involves serious bodily injury. It is a felony of the second degree (10-year maximum) [Code 18-702 (2) (a)].

3) Aggravated Assault with a Deadly Weapon[18]__This is a felony of the third degree (5-year maximum) [Code 18-702 (2) (b)].

[16]88 Idaho 117, 397 P.2d 261 (1964).

[17]An attempt by "physical menace to render another afraid of imminent serious bodily injury" is also simple assault, as is negligently causing bodily injury to another with a deadly weapon.

[18]This includes an attempt to cause, as well as actual causation, of bodily injury to another person with a deadly weapon committed purposely or knowingly.

S.B. 1338 which was introduced in the 1972 Legislature, and which subsequently passed the Senate without opposition, created a fourth category of assault to be known as "felony assault." The essence of this amendment is to create a felony of the first degree for the use of, or the indication "by any manner" of the availability of, "any weapon" during the commission of "any felony." The proposed amendment then goes on to amend Code 18-2303 to provide that the use of any weapon during the commission of any felony would be grounds for sentencing to an "extended term" of imprisonment (Discussed at IV., B., 2 of this article). The advisability of such an amendment is questionable only as to the means implemented to achieve its desired objective. Code 18-702(b)(2) would seem to cover the assault with a dangerous weapon, although it is punishable as only a felony of the third degree. However, any assault with the intent to commit a crime is treated under Code 18-501, dealing with "attempts" to commit a crime.[19] In addition, the "multiple offender" category of the extended sentencing provisions of Code 18-2303(4) would seem to cover the majority of situations where a felony is attempted with the use of a dangerous weapon, since both the use of the weapon and the attempted felony would constitute a multiple offense for which the extended term could be exercised. The latter treatment, in this author's opinion, would retain for the courts the desired flexibility in rehabilitation.

The Code classification serves to include those offenses such as assault with chemicals, assaults by means of whips, sticks or leather implemented by the threat of deadly force, and the like, which were the object of separate legislation in the past [*see*, e.g., former I.C. § 18-905]. The penalties provided under the new Code are sometimes more severe than allowed under the previous statutes. Specific definition of such terms as "deadly weapon" and "bodily injury" is provided in Code 18-210. Also noteworthy is the concept that bodily injury requires physical pain, illness or any impairment of physical condition. Thus, mental anxiety must manifest itself physically to be recognized under this definition. The fact that there has been an unlawful touching without actual injury is not enough for the crime of assault.

Reckless conduct which may tend to place another person in danger of death or serious bodily injury is given the separate classification of "reckless conduct" in Code 18-703. Included in this offense is the intentional pointing of a gun at or in the direction of another, whether loaded or unloaded.

The exhibition of deadly weapons before another in a rude, angry or threatening manner, the subject of a specific statute in former IDAHO

[19]*See also* MODEL PENAL CODE § 201.10, comment 3 (Tent. Draft No. 9, 1959).

CODE § 18-3305, would be covered by the language of the Code in 18-703. This language operates in effect to consolidate all of Sections 18-3301-3305 of the former Idaho statutes.

On the other hand, terroristic threats which create serious alarm for personal safety, whether they be directed to an individual or to the public at large, constitute a felony of the third degree under Code 18-704. Examples would be an anonymous letter to an individual threatening murder or a telephoned bomb threat. Punishment for such offenses is dependent upon such factors as the seriousness of the threat and the psychological impact the threat may have produced. Any benign ultimate purpose of the actor is not considered by the authors of the Code to exempt the individual from liability under this statute.[20]

C. KIDNAPPING & RELATED OFFENSES

1. Kidnapping

The common law defined kidnapping as the forcible abduction or stealing away of a man, woman or child from his own country and sending him into another. Originally it was a misdemeanor, but modern statutes designate it as a felony and under certain circumstances, it is a capital offense. The Idaho Code formerly stated that kidnapping for the purpose of securing ransom was kidnapping of the first degree and punishable by death or life imprisonment [former I.C. § 18-4503]. Any other kidnapping was that of the second degree and carried a penalty ranging from imprisonment for a minimum of one year to a maximum of twenty-five years [former I.C. § 18-4504].

Of course, the gravamen of the crime no longer is the crossing of territorial boundaries, but centers on the infringement of personal freedom. The essential element of the crime under past Idaho law was the unlawful detention of the individual against his will. A "carrying away" to another county or state was not necessary. Thus, the crime of kidnapping contained all the elements of false imprisonment.[21] A special section of former IDAHO CODE § 18-4501 included detention of a child under the age of sixteen with the intention of keeping him from his parent as within the offense. Additional legislation provided for offenses dealing with prostitution, peonage and white slave traffic, for which differing penalties were established.[22]

The objective of the Code is to create a statutory classification which discriminates between false imprisonment and the more terrifying and

[20]MODEL PENAL CODE § 211.3, Comment (Offic. Draft, 1962).
[21]*See* State v. Evans, 72 Idaho 458, 243 P.2d 975 (1952).
[22]*See* former IDAHO CODE §§ 18-5601, 18-5605-5610.

dangerous abductions for ransom or other felonious purposes. This goal is attempted by a division which includes the following offenses: Kidnapping [Code 18-802]; felonious restraint [Code 18-803]; false imprisonment [Code 18-804] and interference with custody [Code 18-805].

Included in the definition of kidnapping are a number of distinctions worthy of comment. For instance, a person is guilty of kidnapping if he unlawfully removes another from his place of residence, business, or some substantial distance from the vicinity in which the victim is found [Code 18-802]. In addition, the same section states that unlawful confinement for a number of enumerated purposes is included within the offense. Notable is the variance from the Model Penal Code language adopted by the Idaho legislature. Kidnapping is said to consist of the unlawful confinement of another for the purposes of: 1) holding for ransom or reward, or 2) facilitating the commission of any felony or flight thereafter, or 3) infllicting bodily injury or terrorizing the victim or another, and 4) interfering with the performance of any governmental or political function [Code 18-802]. Deleted from the Idaho version is the Model Penal Code provision Section 212.1, that such confinement has to be for "a substantial period in a place of isolation." The authors of the Model Penal Code had as one of their primary goals in formulating this section the elimination of prosecutions for kidnapping where the victim was simply moved or detained incident to a crime, such as robbery. The prosecution of the defendant in *People v. Knowles*,[23] is illustrative. There the defendant was charged with both armed robbery and kidnapping on the grounds that he had forced the storekeeper into a back room. Such treatment was termed by the authors of the Model Penal Code as "absurd" and "abusive" and only a means of substituting the greater penalties provided for kidnapping.[24] The Idaho modification apparently renders any such confinement facilitating the commission of another felony as kidnapping. In this respect the Idaho legislature differed with the authors of the Code.

Kidnapping constitutes a felony of the first degree under the Code, but is not punishable by death. If death occurs, the appropriate charge would be murder, for which Code 18-607 would allow imposition of the death penalty. The Code does provide that where the kidnapped victim is voluntarily released "alive and in a safe place" before trial, the offense is reduced to a felony of the second degree [Code 18-802].

2. Felonious Restraint

A second classification known as "felonious restraint" applies to those situations where an individual is held unlawfully under circumstances

[23]35 Cal.2d 175, 216 P.2d 1 (1950).
[24]*See* MODEL PENAL CODE § 212.1, Comments 1, 3 (Tent. Draft No. 11, 1960).

exposing him to risk of serious bodily injury or in a condition of involuntary servitude. It is a felony of the third degree and thus provides a penalty intermediate between that provided for kidnapping and false imprisonment. However, under this offense the victim need not be isolated, in danger of death, nor necessarily terrorized.[25] Also, the requirement exists that the actor must "knowingly" restrain another, as defined in Code 18-202.

3. False Imprisonment

False imprisonment constitutes the third offense under this section and is a misdemeanor. It is essentially the same offense under both the former Idaho statute [I.C. § 18-2901] and the Code definition [18-804]. However, one significant difference is the Code provision that the unlawful restraint must result in a "substantial" interference with the victim's liberty. Former Idaho law contained no such qualification. Seemingly included within the Code offense are those existing provisions of the Idaho Code referring to refusal to obey writs of habeas corpus and related offenses [former I.C. §§ 19-4234, 19-4236]. These sections were not repealed by the Code.

4. Interference with Custody

Finally, the authors of the Code created a special section to cover those situations involving interference with the custody of children and committed persons. Under this section, any person who take or entices any child under the age of eighteen from the custody of the parent, guardian or other lawful custodian is guilty of a misdemeanor. Should the actor not be a parent, guardian or person in equivalent relation to the child, and should he act with knowledge that his conduct would cause alarm for the child's safety, the offense is a felony of the third degree. It is deemed an affirmative defense if the actor believed his action was necessary to protect the child, or if the child (older than the age of fourteen) was taken away at his own request without the further intent to commit a criminal offense with or against the child. Where the situation reflects an intent to inflict physical harm or terrorization by the abduction, kidnapping would be the more appropriate charge.[26]

5. Criminal Coercion (Extortion or "Blackmail")

This offense also involves restriction of individual freedom and is for that reason included among the kidnapping offenses. The means employed are different, but the end result is often the same—the obtainment of somethng from another by means of threatened action or

[25]MODEL PENAL CODE § 212.2, Comment (Tent. Draft No. 11, 1960).
[26]*See* MODEL PENAL CODE § 212.4, Comment (Tent. Draft No. 11, 1960).

exposure. However, offenses under this section are not those terroristic threats discussed in relation to Code 18-704. Rather, the offense involves threats to commit any criminal offense, to accuse anyone of such, to expose certain secrets, or to affect official action. Also elementary to this section is the requirement that the prosecution show that the coercive threat was not for a benign purpose. The example given in the commentary to the Code is the case of a threat designed to deter another person from continuing to take narcotics. Such a threat would not be an offense unless made solely to acquire from the other peron some benefit or property.

Criminal coercion constitutes a misdemeanor, except under those circumstances where the threat is to commit a felony or where the actor's purpose is otherwise felonious. Situations of the latter nature would result in a felony of the third degree. Note also the provisions of Code 18-1305, which include extortion within the offense of "theft" when property of another is obtained.

D. SEXUAL OFFENSES

The Code changes considerably the law of sex crimes. The fundamental objective of this section of the Code is to eliminate penal legislation concerning private sexual relations not involving violence or imposition upon children, mental incompetents, wards or other dependents. The reasoning behind this objective is grounded upon the fact that state criminal laws going beyond this were generally not enforced, or were the subject of discriminatory enforcement. In addition, such legislation often served only to provide a basis for blackmail. Inter-spousal relations, where both parties are merely living as man and wife, even though not legally married, fall within this exclusion [Code 18-907]. In addition, the Code excludes such crimes as fornication [former I.C. § 18-6603], adultery [former I.C. § 18-6601], and lewd cohabitation [former I.C. § 18-6604] altogether and promotes a new scheme of classification.[27]

1. Rape and Related Offenses

The common law defined rape as "unlawful carnal knowledge of a female by force and without her consent."[28] By "unlawful" was meant that a husband could not be guilty of raping his own wife, even though

[27]H.B. 525 and H.B. 526 were introduced in the 1972 Idaho legislature to reinstate fornication and adultery as a misdemeanor and a third degree felony, respectively. Such legislation, in this author's opinion, is not advisable for the simple reason that such laws are not enforced and serve only as an opportunity for blackmail. Furthermore, as with prohibition, the legislation of morals has little, if any effect, upon the elimination of the social ills which such legislation is advanced to correct. *Accord,* MODEL PENAL CODE § 207.1, Comments (Tent. Draft No. 4, 1956).

[28]PERKINS, *supra* note 11 at 152.

he acted by force and against her will. "Without consent" referred to such situations as where the female was an incompetent or where she was actually forced, coerced by such things as drugs, alcohol or threats, or fraudulently induced into submission.[29] The slightest sexual penetration was sufficient to constitute "carnal knowledge."

The old statutory definition of the crime was embodied in former IDAHO CODE § 18-6101. In essence, the above common law principles were retained except for the age limit on "statutory rape." Under the former Idaho statute, carnal knowledge of a female under the age of 18 was defined as rape, regardless of the girl's consent. The common law declared the age of 10 to be that below which such intercourse constituted a felony. Punishment under the former Idaho law was within the discretion of the trial court and ranged from a minimum of one year to a maximum of life imprisonment [former I.C. § 18-6104]. However, where evidence of "aggravation to the extent present in other cases" was not present, a sentence of twenty years was deemed excessive.[30]

The basic change brought about by the Code is not so much with regard to definition as it is to grade the offense into felonies of three categories. The Code in 18-902 states that rape is a felony of the second degree unless the actor inflicts serious bodily injury or unless the victim was not a voluntary social companion of the actor and had not previously permitted him sexual liberties.

In determining whether rape is a felony of the first degree, three factors must be considered. If, in the course of the crime the male actor "inflicts serious bodily injury on anyone," the crime is a felony of the first degree. Somewhat more difficult to apply are the remaining factors: social companionship, and allowance of previous sexual liberties. Supposing a case of rape, it would be a second degree felony if the actor raped one who was *not* his social companion on the occasion of the crime, but who had previously granted him sexual liberties.[31] This result is obtained because the two elements are joined by "and," and because the exception, stated in the negative operates to raise the second degree felony to a first degree felony. Similarly, if the actor raped a social companion who had not previously granted him sexual liberties, it would be a second degree felony. A *fortiori,* if the female was both a social companion and former sexual partner, the rape is second degree. In other words, to raise the offense to the first degree, *both* elements, social companionship and previous liberties,

[29]*See e.g.,* State v. Elsen, 68 Idaho 50, 187 P.2d 976 (1947).
[30]*See* State v. Linebarger, 71 Idaho 255, 232 P.2d 669.
[31]Presumably, the word "previously" extends at least a reasonable distance into the indefinite past.

must be *absent* from the case. If either is present, the felony is second degree.

A new category of offense under the heading of "Gross Sexual Imposition" is declared to be a felony of the third degree [Code 18-902 (2)]. It is committed in the following situations: a) Where the male uses such force or threat of such force as would prevent resistance by a woman of "ordinary resolution," but such force does not involve the possibility of imminent death, serious bodily injury, extreme pain, or kidnapping; b) Where the actor has knowledge that his consort suffers from such a mental disease or defect as renders her incapable of appraising the nature of her conduct. (Note that this would require a case of intercourse with a woman known to the defendant to be manifestly and seriously deranged. Mere failure of the female to consider remote consequences of her act or the affectation of such judgment resulting from the joint consumption of drugs or liquor would not suffice);[32] and c) Where the actor knows that the woman mistakenly submits because she believes the actor to be her husband. Noteworthy again is the Code statement that threatened force does not have to be confined to the person of the victim. Rather, a threat directed toward any other person which has the effect of coercing the victim into submission is sufficient. This is an apparent change in Idaho law.

The most significant change is the one which the Code effects on the crime of "statutory rape." As noted in the discussion of rape [Code 18-902], rape of a child below the age of twelve will most likely result in conviction of a first degree felony. Mistake of age when in reference to Code 18-904 is a defense. This is the section of the Code which reduces to sixteen the legal age at which a female can consent to sexual intercourse. Proof by a preponderance of the evidence that the actor believed the female to be sixteen years old is a defense [Code 18-907 (1)]. To this extent *State v. Swenson*,[33] holding mistake of age to be no defense, is abrogated.

Note that the Code does not impose criminal liability on the male for mutually consensual acts when the female is under sixteen and when the actor is not at least four years older than the other person. The purpose of this provision is to render non-criminal such sexual activity between youngsters of substantially the same ages. Consensual activity is non-criminal in any event where the female is sixteen or over. For example, if a male twenty years old had intercourse with a fourteen-year-old female who consented, it would be statutory rape. If a seventeen-year-old male had intercourse with the same female by her consent, it

[32]*See* MODEL PENAL CODE § 2131, Status of Section (Proposed Offic. Draft, 1962).
[33]36 Idaho 219, 209 P. 1072 (1922).

would be non-criminal. It is statutory rape for a male of any age over thirteen to have intercourse with a female under the age of twelve (except as the juvenile statutes may indicate otherwise).[34] The legislature chose not to include coercion by the promise of marriage in Code 18-904. Such a provision was included in Model Penal Code §213.3 (d).

2. Deviate Sexual Intercourse

This crime, defined as sexual intercourse per os or per anum between human beings not husband and wife, is dealt with in Code 18-903. Included with this offense is any form of sexual intercourse with an animal. Just as with normal sexual relations, the attitude of the Code is to limit criminal sanction to those situations involving forced submission or the imposition of such activity upon children or incompetents. Thus, the same situations which constitute rape or gross sexual imposition correspond to constitute the offense of "Deviate Sexual Intercourse by Force or Imposition." The major difference exists only in the elimination of the provision for a felony of the first degree whenever actual bodily harm is inflicted or where the victim was not the voluntary social companion of the actor. Depending on the degree of imposition, the felony is of second or third degree. Public solicitation of either homosexual or heterosexual relations is prohibited in the section of the code relating to public indecencies and prostitution [Code 18-2102, 18-2103].

3. Sexual Assault

This offense, under Code 18-905, presents a parallel to the above offenses in that the same type of actions warrant criminal punishment. The only difference is that it is a lesser offense when the prohibited activity falls short of actual penetration such as would constitute rape or deviate sexual intercourse. Sexual contact under this section is defined to include any touch of the sexual parts of the person for the purpose of arousing or gratifying sexual desire. Presumably this intent can be demonstrated by proof of the defendant's acts and the surrounding circumstances.[35]

Previous Idaho law contained a separate statute prescribing lewd and lascivious conduct with a minor child [former I.C. § 18-6607]. The Code, in essence, extends these provisions to include all non-consensual sexual contact. However, note that sexual assault of a child under the age of twelve constitutes a felony of the second degree. The Code thus reduces the seriousness of the lewd and lascivious type offense since under former IDAHO CODE § 18-6607 the offense carried up to a life sentence.

[34] *See* also CODE 18-410.
[35] *See* State v. Ross, 92 Idaho 709, 449 P.2d 369 (1968).

4. Indecent Exposure

A common law misdemeanor, indecent exposure was codified in former IDAHO CODE § 18-4101(1). Under the wording of that statute, exposure in any public place constituted an offense. The Code is more explicit in requiring that the exposure be done for the purpose of arousing or gratifying the sexual desire of himself or another not his spouse [Code 18-906]. Viewing such activity as threatened sexual aggression, the authors of the Code declared this offense to constitute a misdemeanor and included it within the article containing the sexual offenses.

Another statute, entitled "open lewdness," is contained in Code 18-2101. Chapter 21 deals with "public indecency." The statute is directed toward lewd acts likely to be observed by others who might be offended or alarmed and is a petty misdemeanor. However, the Code fails to define "lewd conduct." Idaho case law is helpful to the extent of stating that the terms "lewd" and "lascivious," with relation to former IDAHO CODE § 18-6607 (lewd conduct with a minor child), were not uncertain since such words are in common use and are meaningful to a person of ordinary understanding.[36] The authors of the Code state only that these sections of the Code are not directed toward the control of dress in such places as private as nudist colonies or as public as the public beach. Such regulation is relegated to local ordinance.[37] Thus, perhaps the best guide to interpretation of these sections is to determine whether the act involves sexual aggression or a public display under circumstances calculated to affront or alarm viewers.

5. General Provisions Relating to Sexual Offenses

Besides the provision regarding mistake of age as a valid defense under certain circumstances, which was referred to previously in paragraph I. D. 1., Code 18-907 contains a number of provisions applicable to all sexual offenses. One such provision creates a statute of limitations by requiring prompt complaint. The requirement is met by a filing of the complaint with the public authority within three months of the date of the occurrence of the offense, or in the case of a child under twelve or an incompetent, within three months of the date at which the parent or guardian or some other specially interested person learns of the event [Code 18-907 (3)]. No previous Idaho statute has imposed such a requirement, but failure to report the incident within a reasonable time under the common law raised a strong, but not conclusive, presumption against the credibility of the complaint.[38] Now such failure will result in an affirmative defense.

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[36]State v. Evans, 73 Idaho 50, 245 P.2d 788 (1952).
[37]*See* MODEL PENAL CODE §§ 213.4, 251.1, Comments (Tent. Draft No. 13 1961).
[38] *See e.g.*, People v. Kearney, 110 N.Y. 188, 17 N.E. 736 (1888).

Corroboration of the victim's testimony is also required under Code 18-907 (2). The original Model Penal Code version called for corroboration only in the case of felonies, but the Idaho legislature modified the section to require corroboration for all offenses. This corresponds to the requirements of existing statutory and case law.[39] Circumstantial evidence is sufficient corroboration under this statute, as it was in older Idaho law.[40] Presumably, however, case law to the effect that corroboration is not required where there is no conflicting evidence or where the character of the victim is not impeached will remain good law.[41] Note also the Code requirement of a jury instruction advising them to use special care in the evaluation of the testimony of the victim due to the emotional involvement and difficulty of proof [Code 18-907 (4)].

Notably absent from the Idaho adoption of the Code is the Model Penal Code provision allowing testimony concerning other promiscuous activity of the victim. Such was deemed a defense to the offenses of seduction and certain situations of sexual assault.[42] Under the case law of Idaho, evidence of unchaste character is not a defense, but is generally admissible on the issue of whether the woman consented. Such evidence was inadmissible, however, with reference to rape cases involving a minor incapable of legal consent.[43]

III. OFFENSES AGAINST PROPERTY

A. Arson, Criminal Mischief, and other Property Destruction

1. **Arson.** Arson under the common law, was defined as "the malicious burning of the dwelling of another" and was a felony. Restricted to this definition, conviction was dependent upon a showing that a building was destroyed or damaged by fire and that the building was used as a habitation by another.[44] Enactment of former IDAHO CODE §§ 18-801-18-804 resulted in an alteration of the offense. Statutory arson under these sections required a "willful and malicious" burning of the property of either the actor or another. The offense was then divided into various categories dependent upon the nature or use of the building destroyed. Burning of personal property of another was arson of the third degree, while attempted arson constituted arson of the fourth degree.

The main feature of the Code [18-1001] is a gradation of the offense based upon both the kind of property destroyed or imperiled and the

[39]*See former* IDAHO CODE § 19-2117; *see also* State v. Gillum, 39 Idaho 457, 228 P. 334 (1924).
[40]*See e.g.*, State v. McCandless, 70 Idaho 468, 222 P.2d 156 (1950).
[41]*See* State v. Linebarger, 71 Idaho 255, 232 P.2d 669 (1951).
[42]MODEL PENAL CODE § 213.6 (3).
[43]*See* State v. Pettit, 33 Idaho 326, 193 P. 1015 (1920).
[44]Perkins, *supra*, note 11, at 216.

danger which results to the person. For instance, a person commits felony of the second degree if he starts a fire or causes an explosion with the purpose of destroying a building or occupied structure of another. A similar conviction is warranted where the actor destroys a building, even his own, for the purpose of collecting insurance. However, where the actor "recklessly" causes a fire or explosion which either places another person in danger of death or bodily injury or threatens the building or occupied structure of another, he is guilty of a felony of the third degree known as "reckless burning" [Code 18-1001(2)].

A significant Idaho alteration from the Model Penal Code draft is the provision for an affirmative defense to the offense of "reckless burning." Under this proviso [Code 18-1001(2)(c)], proof that the conduct of the actor did not recklessly endanger another person's building or occupied structure, or place any other person in danger of death or bodily injury, is an affirmative defense. The Model Penal Code draft prescribed this defense for the crime of arson, which is a felony of the second degree, and the Idaho legislature substituted it for use with "reckless burning," a felony of the third degree. Thus, the burning of one's own property to collect insurance, regardless of its effect or lack of effect on others, is arson under the Idaho modification. The legislative intent seems clear enough, but the purpose would have been better accomplished by completely deleting the affirmative defense language, instead of moving it down under reckless burning. Placed where it is, it simply seems to say that it is an affirmative defense to show that the crime did not occur. Standing alone, that would amount to nothing more than a general denial, which is not technically an affirmative defense. But the inclusion of the affirmative defense language under reckless burning leads to the incongruous conclusion that the defendant must come forth with evidence supporting his "affirmative defense" of no reckless burning before the state need "disprove" his "affirmative defense" by showing reckless burning. This conclusion follows from Code 18-112 (2)(a), which does not "require the disproof of an affirmative defense unless and until there is evidence supporting such defense." Of course, no judge will read the section so as to impose on the defendant the burden of disproving the crime. However, this is an example of taking language out of a context where it serves a purpose (although the legislature disagreed with the policy) and placing it in a context where it only serves to confuse the otherwise relatively clear language. Code 18-1001(2)(c) should be deleted.

Also significant is the definition given "occupied structure" in Code 18-1001(4). By definition, occupied structure is said to include "any vehicle, structure, or place adapted for overnight accommodation of

persons, or for carrying on business therein, whether or not a person is actually present." The authors of the Code indicate that this language is intended to confine offenses under this section to those specially cherished properties, whose burning would typically endanger life.[45] Consequently, proof of occupancy, while not an absolute necessity (since it is arson to set a fire or explosion to destroy a "building" of another) is required, at least to the extent of showing that the "structure" is being used by human beings in ways that make burning or explosion especially hazardous to human life. The authors list ships, sleeping cars, mobile homes and offices as "occupied structures" and exclude ordinary passenger cars, trucks or freight cars.[46] Damage to the latter types of conveyances is covered under the crime of "criminal mischief," *infra.*

A third category of offense contained within the arson statute concerns the failure to report or control a dangerous fire [Code 18-1001(3)]. Under this subsection any person having personal knowledge of, and some official, contractual or legal duty to prevent or combat fire, must make the effort to do so when it does not involve substantial risk to his own person. This is a subjective standard. In addition, should the person have started the fire himself, or if he controls the property on which it is located, he is punishable under the same statute for failure to take action or report the fire when it threatens human life or a substantial portion of another's property. The offense is a misdemeanor.

1. Causing a Catastrophe

Under Code 18-1002, any person who knowingly, purposefully or recklessly causes an event having the potential for rendering widespread damage or injury, is guilty of an offense. A product of our modern era, this statute enumerates as examples such things as fires, floods, explosions, avalanches, the release of poisonous gas or radioactive materials and the destruction of buildings. This list is not all-inclusive, as the statute contains the catch-all "any other means of causing potentially widespread injury or damage." If performed knowingly or purposely, the offense is a felony of the second degree. If the act is reckless, it is a felony of the third degree. Furthermore, the reckless creation of a risk of such catastrophe is a misdemeanor. Should the individual know that he is under an official, contractual or other legal duty to prevent or mitigate the catastrophe, or should the facts indicate that the individual actually caused or assented to the creation of the catastrophic threat, he is guilty of another misdemeanor if he fails to prevent the catastrophe.

The Idaho legislature made an addition to the Model Penal Code for

[45]MODEL PENAL CODE § 220.1, Comment 3 (Tent. Draft No. 11, 1960).
[46]*Id.*

the purpose of including the abandonment of specific appliances as a prohibited catastrophic risk. This section states that one who leaves any ice box, refrigerator, deep freeze, or similar appliance in an unattended and unenclosed place without having first removed the lock or the hinges from the door, commits a misdemeanor [Code 18-1002(4)].

2. Criminal Mischief

Code 18-1003 attempts to punish behavior which threatens or harms property. To this extent it is most comparable to the common law misdemeanor of "malicious mischief."[47] For example, one who damages tangible property of another recklessly, purposely or knowingly, or negligently uses fire, explosives or some inherently dangerous force, is guilty of the offense. In addition, such actions, even when resulting in no actual harm to person or property, constitute "tampering" with the tangible property of another and are included within the offense when persons or property are endangered.

In addition, a unique provision of this section punishes a person who has recklessly or purposely caused another to suffer pecuniary loss by means of deception or threat [Code 18-1003(1)(c)]. This section would extend to those situations involving expensive "practical jokes" or misrepresentations which result in another's economic loss.[48]

Offenses of "criminal mischief" are punishable primarily in accord with the amount of pecuniary loss which results. For instance, the loss of an amount exceeding $5,000 is a felony of the third degree, providing the actor had acted purposefully. If the act was performed purposefully and the loss was over $100 (but not over $5,000) the offense is a misdemeanor. Where the loss exceeds $25, purposeful or reckless action would constitute a petty misdemeanor, and when the amount is below that, the action results in the imposition of a "violation." One important exception to the "dollar damage" concept involves those situations where public water, gas, power, communication or transportation services have been impaired. In this event, the crime is a felony of the third degree.

In summary, the offenses relating to arson, catastrophes, and criminal mischief have consolidated a number of related offenses existing under former Idaho law and have hopefully substituted a more orderly classification. Sentencing procedures, however, will insure the desired flexibility formerly applied by means of separate statutes confined to individual offenses.

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[47]PERKINS, *supra*, note 11, at 331.
[48]*See* MODEL PENAL CODE § 206.3, Comment 3 (Tent. Draft No. 2, 1954).

B. BURGLARY AND OTHER CRIMINAL INTRUSION

1. Burglary

The common law defined burglary as "the breaking and entering of the dwelling of another in the nighttime with intent to commit a felony."[49] As such, successful prosecution for this offense depended upon proving a number of essential elements. For instance, "breaking" did not refer to a physical damaging of property, but required the actor to perform some act of opening to admit him to the dwelling place or places within the "curtelage"—in close proximity to the dwelling place. Technicalities abounded. For example, entering by opening a closed window would suffice, but entry through an already open window would not. "Constructive breaking" was deemed to result wherever authorized entry was obtained by means of deception or the assistance of an accomplice, but entry by an authorized person without deception was not a breaking, even though he might steal once he was inside.

The crime of burglary originated as a means to provide security to the individual while in his place of habitation. This explains the common law restriction of the offense to "dwellings" of others, or places within the "curtelage," as entry into this area was just as likely to result in a confrontation between the occupant and the intruder. The offense was not a crime against ownership, occupancy being the primary consideration. Places used purely for business and not habitation were not subjects of burglary.

Another fundamental reason for the creation of the crime of burglary was to provide adequate punishment for what was really an attempted felony, usually larceny. If the prowler was unsuccessful, for whatever reason, in getting "the goods," he would be guilty of attempt only. Under the common law, such attempts would have been punishable only as misdemeanors were it not for the burglary offense. Consequently, attempted larceny, rape and murder committed by the breaking and entering into a home of another were punishable by death if perpetrated in the nighttime as the separate felony called burglary.

Statutory enactments of burglary, such as former IDAHO CODE §§ 1401-1406, generally broadened the scope of the offense. The concept of "breaking" was removed as an essential element in Idaho.[50] In addition, the statute enlarged the offense to include entry into:

> any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, closed vehicle, closed trailer, airplane or railroad car.[51]

[49]PERKINS, *supra*, note 11, at 192.
[50]*See* State v. Sullivan, 34 Idaho 68, 199 P. 647 (1921).
[51]Former IDAHO CODE § 18-1401.

The common law requirement that the offense occur in the nighttime was retained only to the extent that entry between sunset and sunrise was burglary of the first degree and punishable by a maximum of fifteen years in prison. Burglary committed in the daytime was a felony of the second degree and punishable by a maximum five-year imprisonment.

The Code continues this evolution of the burglary offense by redefining it and establishing new provisions with regard to penalties. Burglary is defined as the entry of a building or "occupied structure," or a separately secured or occupied portion thereof, with the purpose of committing a crime therein. Any entry made pursuant to a license or privilege or during the time in which the premises are open to the public is not regarded as within the offense [Code 18-1102]. This latter provision changes existing Idaho case law, holding that entry of a business place during business hours with felonious intent is sufficient for burglary.[52] This rule made a premeditating shoplifter technically a burglar, a policy which is at best questionable. That policy is removed with the adoption of the Code.

Another retrenchment of the former broad scope of statutory burglary comes from the definition of "occupied structure." The term is defined to include only those structures, vehicles or places adapted for the overnight accommodation of persons or for the carrying on of business. Actual presence of a person is not required, but it is an affirmative defense if the building or structure is proven to be abandoned.

Should entry be into the "dwelling of another at night," or should the actor in the course of committing the offense be armed with explosives or a deadly weapon, the offense is a felony of the second degree under Code 18-1102(2). The crime is a second degree felony where the actor purposely, knowingly or recklessly inflicts or attempts to inflict bodily injury on anyone [Code 18-1102(2)(a)]. "In the course of the offense" is stated to refer to any stage of the crime from the attempt to flight after commission of the offense, thus clearing up what had been a troublesome question for some courts; i.e., when did the crime end, so events were no longer considered part of the crime? In *People v. Huten*,[53] for example, events occurring during flight from the burglary scene were not part of the crime so as to constitute homicide felony murder. Under the Code, the burglary does not end until the flight ends [Code 18-1102(2)]. "Night" is defined to include the period between thirty minutes past sunset and thirty minutes before sunrise [Code 18-1101(2)]. The day-night distinction, crucial at common law, is retained on the basis that darkness best facilitates the commission of the offense, causes more

[52]*See* State v. Bull, 47 Idaho 336, 276 P. 528 (1929).
[53]184 N.Y. 237, 77 N.E. 6 (1906).

alarm to the victims and hampers identification of the suspects.[54] Should burglary be committed outside of these circumstances, it constitutes a felony of the third degree.

One very important innovation of the Code is subsection (3) of Code 18-1102. This provision is designed to prevent the abusive practice of imposing consecutive sentences for both burglary with the intent to steal and for the actual theft or attempted theft. Thus, a person cannot be convicted of both burglary and the ultimate offense which he committed or attempted, unless such additional offense constitutes a felony of the first or second degree. When the target offense is a first or second degree felony, the authors of the Code believed it appropriate for the court to consider whether the intrusion constituted an aggravation of the already serious offense. Where the judge considers it appropriate, the defendant could be convicted and punished under the "multiple offender" portions of the Code [18-2206 and 18-2203].[55]

2. Criminal Trespass

Code 18-1103 provides an offense for "unlicensed and unprivileged entries upon" or "surreptitiously remaining in," the property of another. Where such trespass occurs within a building or occupied structure which is not abandoned, it constitutes a petty misdemeanor with a resulting 30-day maximum penalty. Where such trespass is committed in a dwelling of another at night, it is denominated a misdemeanor. However, note the case of *Ex parte Seyfried*,[56] which holds that a rebuttable presumption of intent to commit larceny is created upon the breaking and entering into a dwelling of another during the nighttime. Where such intent is presumed by the actor's presence, burglary would be the resultant offense, and the accused would be subject to prosecution for the greater offense.

Unlawful entry onto another's property when that property is properly posted or when actual notice forbidding trespass is otherwise communicated to the intruder is punishable as a violation unless the offender defies an order to leave personally communicated to him by the owner or other authorized person. This latter situation warrants punishment as a petty misdemeanor. Similar treatment results when the property is fenced or enclosed so as to demonstrate a design to exclude others [Code 18-1103(2)]. However, where the actor reasonably believes that the owner of the premises would allow him to enter or where the premises were at the time open to the public and the actor complied with

[54] *See* MODEL PENAL CODE § 221.0, Status of Section (Proposed Offic. Draft, 1962).
[55] *See* MODEL PENAL CODE §221.1, Comment 6 (Tent. Draft No. 11, 1960) for a more detailed discussion of these points.
[56] 74 Idaho 467, 264 P.2d 685 (1953).

all lawful conditions imposed on access to or remaining in the premises, he has an affirmative defense [Code 18-1103(3)].

C. THEFT AND RELATED OFFENSES

One of the most important objectives in formulating the Model Penal Code was the desire to consolidate those provisions of the criminal law dealing with the misappropriation of property. Examination of the historical progression of the common law toward the creation of these offenses might serve to bring the significance of this objective into better perspective.

Larceny was one of the few common law felonies, and was punishable by death. It was said to be "the trespassory taking and carrying away of the personal property of another with the intent to steal the same."[57] Since it was a capital offense, the interpretation of the above definition led to the development of a number of extremely technical distinctions. For instance, articles taken had to be subject to possession and ownership as well as be within the classification of "personal" property. Thus, theft of a wild animal or animals of a "base nature" would not qualify. In addition, such things as growing crops, minerals in the ground, or fixtures attached to the land were not considered personal property, and hence not the subject of larceny. Accordingly, this activity was punishable only as a trespass upon the land and not as larceny.[58]

Further distinctions grew from the concept that larceny was an offense against possession, and not against title. At common law only the actual possessor (regardless of who the owner was) had an interest in maintaining possession and only he could be dispossessed. Thus, where an individual legally acquired possession he could not be guilty of the offense of larceny, even though he later appropriated the goods to his own use.

The importance of possession as an element led to the creation of even more technicalities. For instance, larceny was not a "trespassory taking" under the common law when the defendant obtained the goods with the consent of the owner. Exceptions developed where the accused had felonious intent at the time of the acquisition; where a bailee had either "broken the bulk" or violated conditions of the bailment; or where the accused was merely an "ordinary servant," as distinguished from a "trusted employee," in which case the individual was deemed to have only custody and not possession, so as to make the offense larceny.

[57]PERKINS, *supra*, note 11, at 234.

[58]*See e.g.*, State v. Jackson, 218 N.C. 373, 11 S.E. 2d 149 (1940) where the subject of "theft" was a tombstone.

Moreover, goods mistakenly delivered or found could not be the subject of larceny unless the defendant had knowledge of the true ownership or mistake at the time of acquisition.[59] Since ownership was not a prerequisite, a true owner could be guilty of larceny by appropriating an item of his own which was legally in the possession of another. The common example is the case of delivery of a watch to a jeweler for repair and subsequent taking of the watch with the intent of depriving the jeweler of compensation for his services.[60]

The criminal offenses created as substitutes for those acts not sufficient for larceny were embezzlement and the obtaining of property under false pretenses. Embezzlement was defined as "the fraudulent conversion of personal property by a person to whom it was entrusted either by or for the owner."[61] Thus, embezzlement involved a taking by one already in possession and was a trespass against ownership. Still present, however, was the requirement of a specific intent to deprive the owner permanently of his goods. This element created further difficulties of proof with regard to both larceny and embezzlement.

The crime of false pretenses was unknown to the common law of England, but was made a misdemeanor under a statute old enough to be common law in this country. It is defined as "knowingly and designedly obtaining the property of another by means of untrue representations of fact with intent to defraud."[62] Essential elements of the crime were the requirements that title pass; that the false representation be known to be false; and that the representation be made with the specific intent to deceive.[63]

To this body of law was added a large number of legislative enactments dealing with particular groups of people and circumstances which, as time progressed, became the object of increased public concern. Examples include statutes which cover such diverse subjects as the receipt of stolen property [former I.C. § 18-4612], embezzlement by bankers and fiduciaries [former I.C. § 18-2406], embezzlement by carriers [former I.C. § 18-2404], the fraudulent obtainment of food or lodging [former I.C. § 18-3107], and false advertising [former I.C. § 18-3112].

Two cases illustrate the operation of the technicalities that enveloped the field of the acquisitive offenses as they matured under the common law. In *Commonwealth v. Hays*,[64] a bank depositor withdrew his account,

[59]*See* PERKINS, *supra* note 11, at 239-254.
[60]*See* State v. Stevenson, 161 Wash. 357, 296 P. 1052 (1931).
[61]PERKINS, *supra* note 11, at 288.
[62]*Id.* at 296-297.
[63]*See* MODEL PENAL CODE, Appendix A (Tent. Draft No. 1, 1954) for further examination of the development of these offenses.
[64]14 Gray 62 (Mass. 1859).

the actual balance of which was $130. The teller mistakenly handed the depositor $230. The depositor was aware of the discrepancy at the time. The teller, however, intended to pay out $230, believing at the time that $230 was the balance of the account. The import of the facts is that the depositor intended to keep $100 that he knew was not his. He was charged with larceny and embezzlement. There was no larceny because possession of the amount of $230 was transferred to the depositor intentionally by the teller. Hence, there was no infringement of possession and no larceny. The court held that there was no embezzlement because there was no relationship of trust or confidence between the teller and the depositor. The appellate court said "the defendant was wrongfully convicted" by the trial jury.

The passage of time—over a century and a half—did not plug the loopholes, for in *State v. Price,*[65] the appellate court again disagreed with a jury over whether a crime had been committed. Lewis won money from Price in an illegal card game. Price then reacquired the money by force. This was held not to be robbery, because Lewis could not acquire valid title to money by the unlawful act of gambling. Although the court was obviously leaving bad characters where it found them, it was also led astray by technicalities. Robbery, being a form of larceny, is a crime againt possession, not against title. The same fact—intentional delivery of a sum of money, which meant no larceny in the *Hays* case—would seem to make the crime robbery in *Price,* since in neither case did the law affirmatively sanction the delivery of the money that was handed over. Price had no legal approval to hand over gambling stakes; the teller had no legal approval for handing over $100 too much. At any rate, perhaps the juries in the respective cases came closer to doing justice.

The Model Penal Code attempts to cut through the technicalities and consolidate all of the offenses under one broadly defined offense known as "theft." In so doing, the authors of the Code hope to prevent procedural difficulties resulting from the fact that, as illustrated, the boundaries between the traditional offenses have been obscure. The broad scope of the statute incorporates a large number of formerly separate statutes relating only to thefts in special circumstances, but hopefully brings the statutory law somewhat closer to the layman's understanding of it as based upon his understanding of right and wrong.

1. General Provisions

Code 18-1302(2)(a) specifies that theft results in a conviction of a felony of the third degree in those cases where the amount taken exceeds $200, or when the property stolen is a firearm, automobile, or other

[65]38 Idaho 149, 219 P. 1049 (1923).

motor propelled vehicle, including motorboats. Subsection (2) (b) of this same statute states that where the property is not taken from the person of another or by the use of threats or violation of a fiduciary relationship, or where the value of the stolen property is proven by a preponderance of the evidence to be less than $50, then the theft is a petty misdemeanor.

S.B. 1299 and the House amendment thereto, passed by the 1972 Idaho legislature and signed by the governor prior to repeal of the Code, also included the theft of any "cow, steer, bull, heifer, calf, horse, mule, swine, sheep or goat" within the class of property, the theft of which would constitute a felony. The substitution of this language in place of the original amendment to include "captured or domestic animals" within the category of theft is reminiscent of the language used in former I.C. § 18-4606. However, the logic of such an enumeration is perhaps questionable in a day and age when the protection of household pets is of equal concern to urban dwellers.

It is submitted that reliance upon a dollar amount would be the better alternative in terms of logic. Furthermore, under former Idaho law, punishment for theft was primarily dependent upon the value of the property stolen. For example, the taking of property having a value of $150 or more constituted "grand larceny" and was punishable by a sentence of one to fourteen years.[66] While exceptions were declared where the property was taken directly from the person (former I.C. § 18-4604); where public funds were embezzled (former I.C. § 18-2413), or in the aforementioned theft of domesticated animals, any theft of property below the specified statutory value was generally a misdemeanor, even though the declared penalty may have differed in specific instances.[67] It would seem that some consistency in this area should be a desired objective.

The affirmative defenses for theft under the Code arise where the actor:

(a) was unaware that the property or service was that of another; or

(b) acted under an honest claim of right to the property or service involved, or that he had a right to acquire or dispose of it as he did; or

(c) took property exposed for sale, intending to purchase and pay for it promptly, or reasonably believing that the owner, if present, would have consented.[68]

[66]FORMER IDAHO CODE § 18-4604 (Supp. 1969); *See also*, former IDAHO CODE § 18-2413 (embezzlement) and former IDAHO CODE § 18-3101 (false pretenses).
[67]*See e.g.*, former IDAHO CODE § 18-3102 (misrepresentation of financial status).
[68]IDAHO CODE § 18-1302(e).

Thus, a specific mens rea is required. It is noteworthy that the Idaho legislature did not enact subsection (4) of Model Penal Code § 223.1. This section set forth that it was no defense that a theft was committed against the actor's spouse, except where the object of the theft was normally accessible to both spouses. In the latter situation, theft could have resulted only when the parties had ceased living together.

Note that the receipt of stolen property by one in the business of buying or selling stolen property is expressly stated to constitute a felony of the third degree in Code 18-1302(a).

2. Theft by Unlawful Taking or Disposition

Code 18-1303 defines theft as including both movable and immovable property. As such, it is quite comprehensive and is declared to include:

> . . . anything of value, including real estate, tangible and intang ble personal property, contract rights, choses-in-action and other interest in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink, and electric or other power.[69]

Note should be taken of the inclusion of "things growing on, affixed to, or found in land," as well as the inclusion of documents in the definition of "movable property."[70] This removes the common law distinctions with reference to the severance of things from realty by the thief referred to above. Documents themselves were not regarded as the subject matter of larceny under the common law since they were mere representations of valuable things, but were so considered under the Idaho Code [former I.C. § 18-4608].

The individual who makes the appropriation of such property may be either a stranger or some person entrusted with the property, such as an agent, bailee, trustee, or fiduciary. The statute simply requires that the subject of the theft be the property "of another" [Code 18-1303], and of such nature that the other person "has an interest which the [thief] is not privileged to infringe" [Code 18-1301(7)]. Thus, those offenses which formerly were classified under separate categories, as larceny, embezzlement, and false pretenses, are consolidated. Also eliminated are the difficult distinctions between possession and custody which so confused the common law. The result is that the crime of theft becomes much more like stealing as it is known to the layman.

The actus reus requirement of theft is that the individual take or

[69]IDAHO CODE § 18-1301(6).
[70]*Id.* at (4).

exercise unlawful control over movable property or, in the case of immovable property, make an unlawful transfer [Code 18-1303]. "Unlawful control" is designed to eliminate terminology such as "steal," "embezzle," and "carry away" which were dependent upon an interpretation of the common law for their definition. A by-product of the elimination of such terminology is the abandonment of mechanical common law standards of physical seizure, "caption," and carrying-away movement, the "asportation." The Code has tried to minimize the differences in procedure and punishment between the attempt and the completed crime. Therefore, the authors of the Code express the desire that differentiations between caption and asportation be interpreted more in line with the ordinary person's visualization of "where the attempt ends and the accomplishment begins."[71]

The criminal state of mind required under this statute for the theft of movable property is only that the actor intend to "deprive" the other person of the property. As defined in Code 18-1301(1), "deprive" connotes application to cases of prolonged as well as permanent deprivations. As such, it represents a concept differing from the common law requirement that the actor intend to deprive another of his property permanently. Idaho, however, seems to have adopted this view previously in the decision of *State v. Bassett*.[72] Theft of immovable property requires an intent to benefit the actor or another not entitled to such benefit [Code 18-1303(2)]. Theft under a claim of right, if meeting the circumstances noted previously, constitutes an affirmative defense [Code 18-1302(3)].

3. Theft by Deception

The provisions of Code 18-1304 include, under the theft offense, those offenses which formerly dealt with the appropriation of property under false pretenses. "False pretense" was defined as "a fraudulent representation of existing or past fact by one who knows it is not true for the purpose of inducing another person to whom it is made to part with something of value."[73] The main difference between larceny and the crime of false pretenses was that in larceny the true owner had no intention of parting with title to his property, while in false pretenses the owner did intend to part with title.[74] Previously, Idaho law dealt with this subject by means of a number of statutes applying separately to fraudulent representations resulting in specific acquisitions. For instance, see those sections relating to false statements to obtain property,

[71] MODEL PENAL CODE § 206.1, Comment 3 (Tent. Draft No. 2, 1954).
[72] 86 Idaho 277, 385 P.2d 246 (1963).
[73] State v. Whitney, 43 Idaho 745, 254 P. 525 (1923).
[74] *See* Zink v. People, 77 N.Y. 114, 121 (1879).

cash or credit [former I.C. § 18-3102], selling land twice [former I.C. § 18-3104] and the obtaining of food or lodging under false pretenses [former I.C. § 18-3108].

The Code states that a person is guilty of theft if he purposely obtains property of another by means of "deception." The rest of the statute is then spent in definition of this term. It is said to result when a person purposely:

> (1) creates or reinforces a false impression, including false impressions as to law, value, intention, or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise; or
>
> (2) prevents another from acquiring information which would affect his judgment of a transaction; or
>
> (3) fails to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship; or
>
> (4) fails to disclose a known lien, adverse claim or other legal impediment to the enjoyment of property which he transfers or encumbers in consideration for the property obtained, whether such impediment is or is not valid, or is or is not a matter of official record [Code 18-1304].

Exempted from the statute by the last paragraph of the section are those deceptions which have no pecuniary significance and "dealer's talk" or "puffing," which in fact would not deceive ordinary persons of the group to whom the statements were directed. An example of the type of deception which would have no pecuniary significance might be a salesman's representations as to his political or religious affiliations. Note that under this statute there is no criminal sanction provided in those situations where the actor takes advantage of a known mistake already influencing the other party. It is only where the actor creates or reinforces the false impression that he has a duty to disclose. Similarly, if he had prevented another from learning the truth, the criminal penalty would be imposed.[75]

4. Theft by Extortion (Blackmail)

Extortion had its origin in the common law where it referred to "the corrupt collection of an unlawful fee by an officer under color of office." It was a misdemeanor.[76] Later development led to statutory expressions,

[75]*See* MODEL PENAL CODE § 206.2, Comments 6, 8 and 9 (Tent. Draft No. 2, 1954).

[76]PERKINS, *supra* note 11, at 367.

such as former IDAHO CODE § 18-2801, which expanded the definition of extortion to refer to (1) any unlawful extraction of another's property by means of a threat not sufficient for robbery, or (2) a communication for the purpose of such extraction. The former Idaho Code set the penalty for this offense at a maximum of a $5,000 fine, five years imprisonment, or both [former I.C. § 18-2803]. Similar treatment was provided for those attempting extortion by threatening letters [former I.C. § 18-2804]. Unsuccessful attempts were punishable by a maximum $3,000 fine, three years imprisonment, or both [former I.C. § 18-2808].

Extortion under the theft provisions of the Code refers to those situations where property is obtained by means of coercion rather than deception. Threats as constituting criminal coercion were discussed in relation to Code 18-806, but referred only to those acts which posed a threat to personal freedom of action. Coercion as a theft offense applies strictly to the obtainment of property. It is somewhat limited in scope in that not all threats made for the purpose of obtaining property are included under the statute. For instances, threats to breach a contract, threats to persuade others to breach contracts, and threats to vote stock a certain way are beyond the scope of the statute. These are but forms of economic coercion which are deemed fundamental to our free bargaining process. The authors of the Code look to civil remedies to deal with abuses of this privilege.[77] Included within the offense are threats to:

(1) inflict bodily injury on anyone or commit any other criminal offense; or

(2) accuse anyone of a criminal offense; or

(3) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or

(4) take or withhold action as an official, or cause an official to take or withhold action; or

(5) bring about or continue a strike, boycott, or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; or

(6) testify or provide information or withhold testimony or information with respect to another's legal claim or defense, or

(7) inflict any other harm which would not benefit the actor [Code 18-1305].

Except for the provision relating to threatened strikes by union leaders, the former Idaho Code generally included all of the above within the

[77] *See* MODEL CODE § 206.3, Comment 1 (Tent. Draft No. 2, 1954).

purview of its statute considering threats as extortion.[78] One notable difference is the extension of the Code to cover threats made to "anyone," rather than just to the victim, or a relative of the victim as provided in the former Idaho Code. The essential element of the crime is the creation of fear, which in turn intimidates another into turning over his property. Thus, the types of harm threatened are limited only in this respect.[79]

It is an affirmative defense under subsections (2), (3) and (4) of the above that the property obtained was in the nature of restitution or indemnification or as compensation for property or lawful services [Code 18-1305]. In these circumstances, it is a crime only when the threat involves an attempt to obtain more than the actor believes is due him. Idaho case law has already accepted this principle in the decision of *Wilbur v. Blanchard,*[80] wherein it was held that the courts will not invoke protection for the wronged party where he attempts to procure a payment in excess of the reasonable value of the property taken from him.

5. Theft of Property Lost, Mislaid or Delivered by Mistake

The common law concept of possession as an element of larceny necessitated a distinction between lost, mislaid or misdelivered property. At early common law, lost articles could not be the subject of larceny as they were not in the possession of anyone. Later common law adopted the concept that lost items were in the "constructive possession" of the losing owner. Subsequent appropriation, when the nature of the property or the locality of the loss presented a "clue to ownership," was larcenous. The law deemed it socially desirable for the finder to take charge of the lost article for the purpose of restoring it to the owner, and socially undesirable for him to appropriate it for his own use when it was possible to restore the property to its owner.[81]

"Mislaid" property was distinguished on the basis that circumstances indicated that the owner intentionally put the article in a particular place for some temporary purpose and then inadvertently left. Strong presumptions of a clue to ownership exist here simply from the probability that the owner will return for his chattel when he realizes that he has left it. Likewise, he will know where to return. Should the circumstances indicate the goods were abandoned, larceny is an impossibility because then they are not deemed the personal property "of another," the last possessor simply leaving the goods to whatever fate befalls them.[82]

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[78] *See* former IDAHO CODE § 18-2802.
[79] *See* MODEL PENAL CODE § 206.3, Comment 12 (Tent. Draft No. 2, 1954).
[80] 22 Idaho 517, 126 P. 1069 (1912).
[81] PERKINS, *supra* note 11, at 248-250.
[82] *Id.*

Proving intent to deprive the owner permanently of his property was a major obstacle to conviction at common law. In order to be a trespassory taking, the actor had to form the requisite intent at the time he found the lost or mislaid property. Later formation of this intent after the actor took charge of the property with the original purpose of restoring it to its owner would not suffice because he obtained possession lawfully. Since the law considered the actor to be in legal possession, his appropriation did not fit the definition of larceny. In addition, no conviction for embezzlement could be obtained as the property was not deemed "intrusted" to the finder.[83]

The delivery of goods by mistake involved similar considerations. If possession was lawfully given to the recipient of the property before he discovered the mistake, there was no larceny, no matter how wrongful the appropriation might have been for his own use. If the recipient knew of the error before he received possession, he was under a duty to disclose the mistake. If he did not, his receipt of the property was deemed a constructive trespass and larcenous.[84]

The Code makes a substantial change in these concepts. Section 18-1306 provides that any person coming into the control of another's property which is known to have been lost, mislaid or misdelivered is guilty of theft if he fails to take reasonable measures to restore the property to the person entitled to possession. This failure has to be with the express purpose of depriving the owner of his property. Conviction is not dependent upon the actor's intent at the time of acquisition. Punishment is warranted only where the actor fails to restore the property within a reasonable time. Thus, the common law distinctions have been eliminated.[85]

A valid question may arise in interpreting what constitutes "reasonable measures" in restoring the property. Apparently, this factual question is left to the court's discretion.[86] However, some of the authors' commentaries leave doubt concerning the necessary measures. For instance, a permanent appropriation is not necessary for guilt. Yet, temporary use of the property such as would not seriously prejudice the owner is said to be permissible. Furthermore, the authors stated that a negligent failure to follow a course of action which would seem apparent to another would not be sufficient for the imposition of a criminal penalty. This squares with Code 18-202(2)(d), in which "negligence"

[83]*Id.; Accord,* State v. Riggs, 8 Idaho 630, 70 P. 947 (1902); *See also* former IDAHO CODE §§ 18-4601, 18-4602.

[84]PERKINS, *supra* note 11, at 253, 254. *See* Commonwealth v. Hays, 14 Gray 62, (Mass 1859) for a situation where a person made off with a $100 windfall; held not larcenous.

[85]*See* MODEL PENAL CODE, § 206.5, Comments (Tent. Draft No. 2, 1954).

[86]*See* MODEL PENAL CODE § 223.5, Status of Section (Prop. Offic. Draft, 1962).

is defined as gross negligence. Only purposeful omission to take steps to restore is deemed adequate.[87] Thus, the courts will have to develop the perimeters of this area on a case-by-case basis.

6. Receiving Stolen Property

The receipt of stolen property was punishable under the early common law, but was not regarded as a substantive offense. It was rather punishable as a misdemeanor on the grounds that the receiver either knew of the commission of a felony, but failed to report it ("misprision of felony") or agreed not to prosecute a known felon in exchange for some valuable consideration ("compounding" a felony). A 1691 English statute provided for conviction of the receiver as an accessory after the fact, but it was not until 1827 that the receipt of stolen property was classified as a substantive offense in England. (No conviction could be obtained for larceny as the receiver acquires the property by voluntary delivery of the original thief. There was no "trespassory taking.")[88]

Modern statutory enactments, such as former IDAHO CODE § 4612, passed in 1864, proceed on the basis that receiving is a separate offense. Under the former Idaho statute, four elements of proof were necessary:

(1) that the property was stolen;
(2) that either the thief delivered it to defendant, or to someone who delivered it to him;
(3) that at the time defendant received possession of the property he knew it was stolen, or that it was received under such circumstances that any reasonable person of ordinary observation would have known that it was in fact stolen property; and
(4) that he received it for his own gain or to prevent the owner from again possessing it.[89]

In addition, the transportation of stolen property into this state was punishable under former IDAHO CODE § 18-4613.

The Code includes the offense of receiving stolen property within its comprehensive "theft" offense. This is in recognition of the fact that the existence of a market for stolen goods is as responsible for the appropriation of another's goods as are the acts of the individual thief. Furthermore, any opportunity for the emergence of technical defenses based upon the legal distinctions between stealing and receiving stolen property is eliminated. From the defendant's standpoint, consolidation also makes

[87] *See* MODEL PENAL CODE § 206.5, Comments (Tent. Draft No. 2, 1954).
[88] PERKINS, *supra* note 11, at 321, 322.
[89] *Accord,* State v. Janks, 26 Idaho 567, 144 P. 779 (1914).

separate convictions for the offense of planning the crime and receiving a portion of the stolen property impossible.[90]

Under the Code a person is guilty of theft by receiving stolen property if he "purposely receives, retains, or disposes" of the movable property of another [Code 18-1307]. A specific *mens rea* requirement that the actor knew the property was stolen or believed the property to be stolen is all that is necessary. This latter provision removes the distinction to the effect that one is not guilty of receiving stolen property if at the time the property is received it is in fact not then stolen property. This continues to be the rule even though the property may have been stolen previously. An example is a situation where the police capture a thief with stolen property and then induce him to dispose of it through his regular channels for the purpose of obtaining evidence against the "fence." Some courts previously would not consider this latter action as involving the receipt of stolen property since it had been recovered before received by the defendant.[91]

Another provision of the Code enumerates circumstances under which the requisite knowledge or belief of a "dealer" will be presumed. A dealer is said to include anyone in the business of buying or selling goods, as well as pawnbrokers. Thus, if a dealer is (a) found in the possession or control of property proven to be stolen from two or more persons on separate occasions; or (b) has in the past year received stolen property other than the property with which he has been accused; or (c) a dealer in property of the sort received, and has purchased it for a price far below its reasonable value, the dealer is presumed to know that the goods received were stolen or believed to be stolen [Code 18-1307(2)]. Note also that "receiving" is defined to include the acquisition of possession, control, or title, as well as lending while holding the property as security [Code 18-1307 (1)].

7. Theft of Services

The common law concepts of caption and asportation resulted in technical differentiations as to the types of property that were the subject of larceny. For example, it would be larcenous to steal a railroad ticket, the ticket being considered merged into the train ride it represented. However, it would not be larcenous to "steal a ride on a train" for the simple reason that the ride is not something that could be taken and carried away.[92] Similarly, the "use" of another's property was not the

[90]*See* MODEL PENAL CODE § 206.3, Comment 1 (Tent. Draft No. 2, 1954).
[91]*See* e.g., People v. Jaffe, 185 N.Y. 497, 78 N.E. 169 (1906); *Contra*, People v. Rojas, 55 Cal.2d 252, 10 Cal.Rptr. 465, 358 P.2d 921 (1961).
[92]PERKINS, *supra* note 11, at 237.

subject of larceny, even though the wrongful user received some value or benefit. A person entering another individual's plant for the purpose of using that person's machines to manufacture his products was not guilty of larceny. The reasoning again is based on the fact that there has been no taking and carrying away.[93]

Modern legislation has sought to bring the theft of services and other such intangibles within the coverage of the penal code. Stealing rides on trains was punishable by former IDAHO CODE § 18-4620. The fraudulent procurement of food and lodging was covered by former IDAHO CODE § 18-3107, and the obtaining of labor under false pretenses was included in former IDAHO CODE § 18-3101. The theft of electricity, even though questionably the subject of larceny at common law, was specifically punishable under former IDAHO CODE § 18-4621.

It is the purpose of the Code to consolidate criminal appropriations of this nature and eliminate piecemeal legislation. Accordingly, "theft" is said to result when the actor purposely obtains services by deception, threat, false tokens or other means and thereby avoids payment for services he knows to be available only for compensation. "Services" are designated to include "labor, professional service, transportation, telephone or other public service, accommodation in hotels, restaurants or elsewhere, admission to exhibitions, use of vehicles or other movable property" [Code 18-1308].

A noteworthy provision in the statute is the creation of a presumption of intent to evade payment for services where service is normally paid for immediately after the rendering of such service, and the actor refuses to pay or attempts to exit without paying [Code 18-1308(1)]. Under these circumstances, the victim is permitted to initiate an arrest without undue risk of liability for malicious prosecution.[94]

Subsection (2) of Code 18-1308 makes punishable the situation where services paid for by one person are diverted without his consent to the benefit of some other person not entitled. This can be for either the benefit of the actor or any other person.

8. Misappropriation of Funds

This section [Code 18-1309] extends theft liability to those cases involving the diversion of funds from their intended purpose by someone in lawful control. An example might be an agreement between an employer and his employees to withhold a portion of their earnings for purposes of paying certain obligations to third parties. A failure to pay

[93] *See* People v. Ashworth, 220 App.Div. 498, 222 N.Y. Supp. 24 (1927).
[94] *See* MODEL PENAL CODE § 206.6, Comment 3 (Tent. Draft No. 2, 1954).

the third party, in the eyes of some courts, would constitute only a breach of contract. This would be on the theory that the property converted was not "of another," as the employee had not received actual payment and then handed the money over again to the employer. Furthermore, the employer could not be convicted of common-law embezzlement since he neither received nor held anything belonging to the employees.[95]

The artificiality of this reasoning is apparent. Idaho, however, seemed to have no problem finding the employer guilty of embezzlement under former IDAHO CODE § 18-2406. However, the Code again serves to consolidate offenses of this nature. Under Code 18-1309, any person who purposely obtains property upon agreement, or subject to a known legal obligation, and fails to make a specified payment or other disposition, is guilty of theft if he deals with the property as his own or fails to make the required payment or disposition. It makes no difference whether the disposition was to be made from the proceeds of the controlled property, the property itself, or from an equivalent amount to be reserved by the employer. The statute is specific in stating that the victim is not required to trace the particular property at the time of the actor's failure to make the required disposition. In addition, special presumptions are made in this section with respect to officers or employees of the government or of a financial institution. Not only are such persons presumed to have knowledge of the criminal liability incident to the type of transactions covered under this section, but any failure to pay upon demand, falsification of accounts, or shortage of funds results in the presumption of appropriation for their own use.

Note that Code 18-1309 is not intended to put the force of the criminal law behind transactions which are in fact credit transactions. Such relationships are deemed only to consist of promises to pay at some time in the future. (The Idaho courts earlier reached this same result by interpreting the creditor-debtor agreement as a non-fiduciary relationship.)[96] Criminal liability is extended only to those situations where the understanding or obligation was to "reserve" a certain amount of assets for the performance of the obligation.[97]

9. "Joy-riding" and Auto Theft

With the introduction of the automobile, a peculiar type of theft became prevalent; an individual, typically a juvenile, would use the automobile of another without the owner's permission. The colloquial expression for this offense was "joy-riding." As noted previously, com-

[95]*See* MODEL PENAL CODE § 206.4, Comments (Tent. Draft No. 2, 1954).
[96]State v. White, 46 Idaho 124, 266 P. 415 (1928).
[97]MODEL PENAL CODE § 206.4, *supra* note 92.

mon-law larceny required the taking and carrying away of the personal property of another with the intent to steal the same. "To steal" meant either an intent to deprive the owner permanently of his possession or to create a substantial risk of permanent deprivation. Larceny did not include the joy-riding offense because the latter usually involved an intent only to deprive the owner temporarily of his possession. Since the trespass frequently resulted in damage to the automobile, or harm to others, and since the claim of an intent to return was usually recognized as plausible, specific legislation was required to render actions of this nature punishable.[98] The range of punishment extended from a maximum of twenty years in Ohio to a maximum of ten days in Pennsylvania.[99] Former IDAHO CODE § 49-143 declared the offense to be a misdemeanor and IDAHO CODE § 18-113 prescribed imprisonment in the county jail for a period not to exceed six months or the imposition of a fine not to exceed three hundred dollars, or both.

The Code denominates the unauthorized operation of automobiles or any other motor-propelled vehicles as a misdemeanor offense [Code 18-1310]. Since the offense relates to the unprivileged use of the vehicle, it is contingent upon the lack of consent of the owner. A reasonable belief by the actor that the owner would have consented to the operation had he knowledge of the situation constitutes an affirmative defense under the section.

It is noteworthy that the offense is limited to "motor-propelled" vehicles. The appropriation of a bicycle, glider, or sailing craft would apparently not be included, even though the same policy considerations are present. Indeed, the original draft of this section did not contain such a limitation.[100] Offenses of this nature might be dealt with under the theft provisions of Code 18-1303 by interpreting of the word "deprive" to include any prolonged withholding of another's property. Code 18-1301(1)(a) would seem to allow such a construction. Abandonment of the property so as to make it unlikely that the owner will recover it would clearly be within the theft offense [Code 18-1301(1)(b)]. "Theft" of any motor vehicle is a felony of the third degree under Code 18-1302.

D. ROBBERY

At common law the crime of robbery was defined as "larceny from the person by violence or intimidation."[101] Thus, the corpus delicti of robbery is the same as was discussed with regard to larceny, except for

[98]PERKINS, *supra* note 11, at 272-273.
[99]*See* MODEL PENAL CODE § 206.6, Comment 2 (Tent. Draft No. 2, 1954).
[100]*Id.*
[101]PERKINS, *supra* note 11, at 279.

the addition of two elements: (1) the taking must be by force or fear, and (2) the taking must be from the person or in the presence of the owner.[102] Since the social interests sought to be protected were protection of one's property and one's personal safety, robbery was punishable as a capital felony in most of the states. More recently, the death penalty has generally been eliminated, although most states retain a maximum sentence of life.[103] Any amount of force, sufficient to create an apprehension of danger or to induce a man to part with his property without his consent, was sufficient to satisfy the force requirement changing the crime from larceny to robbery.[104] It is also important to note that the amount of property obtained during a robbery is immaterial, as a petty thief may also use coercive threats to obtain one's property.

The former Idaho Code provisions for robbery were substantially an enactment of the common law, although it extended the class of persons who might be put in fear to include relatives and persons in the company of the one whose property was seized [former I.C. §§ 18-6501, 18-6502]. The Idaho statute also skirted the common law problem of whether the taking had to be in the presence of the party being intimidated. Thus, under the Idaho statute, coercion toward one which caused him to give directions over the telephone for the disposition of his property elsewhere was robbery.[105] Former IDAHO CODE § 18-6503 provided a sentence of not less than five years to life for the commission of robbery.

The Code broadened the offense of robbery to the extent that a person is guilty of robbery if, in the course of committing a theft, he inflicts serious bodily injury on another, or threatens another with fear of immediate bodily injury, or he commits or threatens to immediately commit a felony of the first or second degree [Code 18-1201(1)]. "In the course of committing a theft" includes both the attempt and the flight after such attempt or commission [Code 18-1201(2)]. Since force used in escape indicates that the offender would have used force to prevent restraint during the actual taking of the property, the wording makes robbery out of what otherwise would have been simple theft. The Code does not require actual asportation of the property for theft as did the common law [*See* Code 18-1303(1)]. The chapter (12) dealing with robbery uses the word "theft" but does not define it. Ostensibly the reference is to the somewhat indirect definition of theft in Code 18-1303. If this is so, an incomplete theft (i.e., where the thief did not gain complete control of the property so as to be able to remove it) would

[102]*Id.* at 279-285.
[103]*See* MODEL PENAL CODE § 222.1, Comment 1 (Tent. Draft No. 11, 1960).
[104]*See, e.g.*, Bauer v. State, 45 Ariz. 358, 43 P.2d 203 (1935).
[105]*See* MODEL PENAL CODE § 222.1, Comment 2 (Tent. Draft No. 11, 1960).

be robbery under the Code where intimidation is used. Under the common law this would not have constituted robbery due to a lack of asportation. In effect, robbery can now grow out of what formerly would have been classified as a mere attempt.

The Code makes robbery a felony of the second degree, except that if, in the course of committing the theft, the actor attempts to kill anyone, or purposely inflicts or attempts to inflict serious bodily injury, it is a felony of the first degree [Code 18-1201(2)]. This approach leaves other important factors, such as whether weapons were possessed, or a high degree of professionalism or organization was evident, to be considered under other sections. The extended sentencing procedures [Code 18-2303 and 2306] and sections on criminal conspiracy [Code 18-503] adequately provide for these factors. Thus, one who commits simple theft cannot be convicted of robbery if later he is found to have had a deadly weapon on his person at the time of the theft. On the other hand, if he brandishes this weapon in the commission of the theft, he is subject to conviction of robbery.

E. FORGERY AND FRAUDULENT PRACTICES**

1. In General

Traditionally, the common law notion of forgery was broken into three distinct crimes: forgery, uttering and counterfeiting. Forgery in the strict sense required the fraudulent making of a false writing having apparent legal significance.[106] The writing had to be a proper subject for forgery, i.e., significant for reasons other than its own existence, such as a negotiable instrument, deeds, diplomas, or a ticket. The writing had to be false in some respect such as a forged signature, false date, alteration, or a blank falsely completed. Lastly, the forgery was not complete without the showing of an intent to defraud. These elements requisite to the crime were substantially identical under former Idaho statutes.[107]

"Uttering" at common law was the offering as genuine an instrument known to be false with intent to defraud another.[108] The chief distinction separating this crime from forgery was that one need not have himself forged the instrument, but need only harbor the knowledge of its falsehood with intent to pass it as genuine.

Counterfeiting was construed narrowly to be the unlawful making, in the similitude of the genuine, of any false money or of any false

**Material in this section was compiled with the assistance of Richard T. St. Clair.
[106]PERKINS, *supra* note 11, at 340.
[107]*See* State v. Booton, 85 Idaho 51, 365 P.2d 536 (1962).
[108]PERKINS, *supra* note 11, at 354.

obligation or other security of the United States or of any foreign government.[109] As soon as the false money or security was made, with the requisite intent to defraud, the crime was complete. Uttering the money being a separate offense, anyone with knowledge of the falsity who attempted to pass it could be convicted without being the counterfeiter. Since there was no state money possible of counterfeiting, one could be guilty of uttering under the state law and of counterfeiting under the federal statutes.

Code 18-1402 consolidates the definition of forgery to include alterations, issuance, and utterance of any writing with intent to defraud or injure anyone or with knowledge of the fraud. It further defines "writing" to include printing and other methods of recording information, money, stamps, credit cards, and trademarks, to mention a few. Thus, the Code combines counterfeiting and uttering under the single crime of forgery. It retains the same basic elements requisite to the crime, i.e., a subject of forgery, a change in the subject making it false, and the intent to defraud.

Formerly, the Idaho Code, in defininig forgery, attempted to list a series of documents regarded as having legal or commercial significance [former I.C. § 18-3601]. Included within the broad definition were the crimes of uttering and counterfeiting.[110] The Code covers the same categories with a broad definition which adds such things as trademarks, credit cards, diplomas and even doctors' prescriptions. Under a separate section, the Idaho Code did provide against forgeries of trademarks [former I.C. § 18-3614]. Comparing the definition of forgery in the Code with former IDAHO CODE § 18-3601, it appears that an indictment will still not lie where the original instrument, claimed to be forged, is void on its face.[111]

2. Grading of the Offense

Forgeries under Code 18-1402(2) are classified as second degree felonies where the subject of the forgery is money, government securities, stamps, or private instruments representing claims to property. The maximum penalty for any forgery is fifteen years under the Idaho adoption, plus a maximum fine of $10,000 [Code 18-2205(2)], as opposed to a maximum sentence of fourteen years under prior Idaho statutes [former I.C. § 18-3604]. Forgeries of commercial instruments, wills, deeds, and other documents affecting legal relations are classified as a felony of the third degree, normally carrying a maximum sentence of seven years

[109] *Id.* at 359.
[110] *See* State v. Baldwin, 69 Idaho 459, 208 P.2d 161 (1949).
[111] *See* People v. Heed, 1 Idaho 531 (1874) where the court said that no one could be damaged by such an instrument.

and a fine of up to $5,000 [Code 18-2205(3)]. Other forgeries, constituting a lesser threat to society and less likely to be repetitious, are classified as misdemeanors [Code 18-1402(2)]. The amount involved on the forged instrument, security, or document is of no importance in determining the classification. All forms of tampering with government records and accounts are treated under Code 18-1709 and not under Code 18-1402. Such tampering is deemed a misdemeanor, except where tampering was with purpose to defraud or injury anyone, in which case it is a felony under the section.

The former Idaho statutes provided for various lengths of imprisonment and fines depending upon the subject matter forged, possessed or uttered. The fourteen-year imprisonment penalty was provided for forgery [former I.C. § 18-3604], possession of forged bank notes [former I.C. § 18-3605], counterfeiting [former I.C. § 18-3608], possession of counterfeit coins [former I.C. § 18-3609], and possession of counterfeiting apparatus [former I.C. § 18-3610]. Falsifying entries in records [former I.C. § 18-3602] and forging public seals [former I.C. § 18-3603], carried a fourteen-year sentence, but under Code 18-1709, such acts would normally, at most, bring seven years as felonies of the third degree. The former statutes further provided lesser sentences and fines for counterfeiting and restoring railroad tickets [former I.C. § 18-3611 and § 18-3612], simulating switch and car keys [former I.C. § 18-3613], and counterfeiting slugs for vending machines or for sale [former I.C. § 18-3619 and § 18-3620]. The Code classification of these as misdemeanors keeps the penalties substantially similar at up to one year imprisonment and a maximum fine of $1,000 [Code 18-2207 and 18-2208]. Forgery of trademarks remains a misdemeanor under the grading of Code 18-3614. The circulation of illegal money [former I.C. § 18-3618] was only a misdemeanor under the former statute for a first offense, but would most likely be within the classification of second degree felony under Code 18-1402(2).

The Code adds a new concept not readily apparent in the former Idaho statutes. It provides that one who purposefully and fraudulently makes or utters any object so that it appears to have value through age or rarity, or the like, which it does not possess, is guilty of a misdemeanor [Code 18-1403]. This is a separate section to facilitate a more workable definition of forgery in Code 18-1402.

3. Fraudulent Destruction – Removal or Concealment of Recordable Instruments

Code 18-1404 makes it a third degree felony for one to purposefully destroy, remove, or conceal any will, deed, or security instrument which

is capable of public recording. Only recordable documents are included because the effects of concealment and destruction of such legally significant instruments are similar to forgery. For example, destroying a second will to allow the probate of an earlier will is more like forgery than destruction of a promissory note. However, destruction of non-recordable instruments and documents is still punishable under "Criminal Mischief" [Code 18-1003].

Former IDAHO CODE § 18-3205 and § 18-3206 provided penalties for mutilation or destruction of any written instrument of another regardless of its ability to be recorded. If the document was a legal notice, there was a provision for punishment of one month in jail or a fine of $100. However, for other written documents, the offender could get a maximum sentence of five years, if he maliciously destroyed an instrument the false making of which would have been forgery [former I.C. § 18-3206]. Note here, again, that the Code does not speak in terms of "malice."[112]

4. Tampering with Records

Code 18-1405 makes it a misdemeanor for one to knowingly and without privilege falsify, destroy, remove, or conceal any records to deceive or injure anyone, or to conceal wrongdoing. The section mainly applies to impairment of private records and accounts falling outside traditional forgery, since government records are handled by Code 18-1709. This section [1405] is to be distinguished from falsifying entries to obtain property, which is more severely penalized under the theft sections.[113]

The comparable former statutory Idaho sections provided that forging or altering entries in books of record was forgery [former I.C. § 18-3602]. Therefore, the maximum penalty would have been a fourteen-year sentence. Tampering with public records by a public official was punishable by a maximum of forteen years [former I.C. § 18-3201], while for the same offense only five years could be invoked against a private individual [former I.C. § 18-3302].

5. Bad Checks

One who issues or passes checks, knowing they will be dishonored by the drawee, commits a misdemeanor under the Code. The issuer is presumed to know the check will be dishonored when he has no account [Code 18-1406(1)], or if the check was refused for lack of funds and he failed to make good within 10 days of notice [Code 18-1406(2)]. The wording of the section eliminates the problem of obtaining property

[112] *See* the discussion of malice with reference to murder.
[113] *See* CODE 18-1303(2); 18-1302(2).

by false pretenses and creates a presumption of knowledge to facilitate arresting the offender and to shift the burden of proof upon the offender to explain the situation. The sentence under this section would ordinarily be a maximum of one year, $1,000 fine, or both [Code 18-2207 and 18-2203].

The old Idaho statute [former I.C. § 18-3106], distinguished between checks above and below $25 as a basis for different degrees of punishment. For cashing a bad check over $25, or failing to have credit or an account, the penalty was up to three years, whereas a bad check under $25 brought only a six-month sentence. As in the Code, knowledge of insufficient funds or no account gave rise to a presumption of intent to defraud, and it was not necessary to have obtained property in exchange for the check. The Code does not distinguish between amounts of bad checks in Code 18-1406. However, where property is obtained, the crime would be theft by deception [Code 18-1304]. In such a case, punishment depends on value. Value over $200 is a felony in the third degree, while that under $50 is a petty misdemeanor. Between the aforesaid amounts, the offense is a misdemeanor [Code 18-1302(2)].

6. Credit Cards

A person commits a third degree felony if he knowingly uses a stolen or forged, revoked or canceled, or unauthorized credit card for purchase of property or services over $200. For purchases under $200, the offense is a misdemeanor [Code 18-1407]. The section is designed to cover the gap in the sections on theft by false pretenses. Those sections do not cover the credit card situation in that the offender does not practice the deception on the seller of the goods.[114] The seller collects from the issuer of the card who ultimately bears the risk, although the issuer was not directly deceived by the user.

The former Idaho statutes covered substantially the same theories [former I.C. § 18-3113], plus provided a penalty merely for possession of forged or stolen credit cards [former I.C. § 18-3116]. It was prima facie evidence of knowledge just to use a false, expired, or unauthorized credit cards [former I.C. § 18-3118]. The degree of the offense provided in former I.C. § 18-3119 was felony for any amount over $60 and a misdemeanor for amounts thereunder.

7. Deceptive Business Practices

Code 18-1408 provides that a person commits a misdemeanor if, in the course of business, he: (1) uses or possesses false measures in

[114]MODEL PENAL CODE § 224.6 Status of Section (Prop. Offic. Draft, 1962).

determining quantities for buying or selling; (2) sells less than represented; (3) sells or offers for sale adulterated or mislabeled goods; (4) makes false or misleading statements for obtaining or selling property, or to promote the sale of securities. It is an affirmative defense to prosecution under this section to show that deception was not knowingly or recklessly practiced. The section replaces traditional crimes known as cheat and false pretenses, but does not require the deceived to actually obtain property. The element of knowledge is, under the section, an affirmative defense rather than an element of the crime, as was the case under prior law. One may be convicted under this section of the Code without even coming within the definition of attempt, as used in many jurisdictions. For example, a butcher with false scales need not even use them, but can be guilty of possession under this section. This relaxation also facilitates proof by dispensing with the necessity of testimony from housewives and elderly persons outlining facts of how they were duped in the local grocery store. Actual misrepresentation is not required as in the comparable sections on theft [*See* Code 18-1304], because of the ease by which quantities can be diminished without any representations being made by the person measuring them. Yet the section does not attempt to interfere with administrative sanctions for breaches of minor regulations.[115]

The prior Idaho law [former I.C. § 71-3105] encompassed the previsions of this section by more broadly outlining the offending actions concerning weights and measures. It also penalized those deceptive business practices as a misdemeanor with a maximum fine of $200, three months in jail, or both. The Idaho law had also set up a comprehensive system providing for administrative checks of weights and measures with certain sanctions imposed for breaches of the regulations. A separate section dealt with fraudulent scales for measuring quantities of ore [former I.C. § 18-7206]. False advertising, as considered under Code 18-1408(5), would have been penalized in the past if the active misrepresentation and obtainment of property thereby was sufficient to satisfy the section on false pretenses [*See* former I.C. § 18-3101], but also are a misdemeanor under IDAHO CODE § 18-3112, which carried a minimum fine of $25. The Code imposes heavier penalties for the offense of false advertising.

8. Commercial Bribery and Breach of Duty to Act Disinterestedly

Under Code 18-1409(1), it is a misdemeanor for anyone to accept a benefit as a consideration for knowingly violating a duty of fidelity. The subsection enumerates several such positions of fidelity, including agent, trustee, lawyer, physician, officer, director, and arbitrator. Its function

[115]MODEL PENAL CODE § 206.24, Comments (Tent. Draft No. 2, 1954).

is to assure the bona fides of such persons in positions of trust by providing for prosecution when they are guilty of conscious disregard of their duties.

Subsection (2) facilitates prosecution of a person who is in the business of making disinterested appraisals when he accepts a benefit to influence his appraisal. A violation of this subsection may be exemplified by a consumer service taking bribes to give certain manufacturers more favorable ratings in their publication.

Subsection (3) provides that one conferring or offering any such benefit to a person described in the section also commits a misdemeanor.

Previously, the Idaho Code only provided for bribery of public officials. It included arbitrators and referees [former I.C. § 18-130], and trustees of municipal corporations [former I.C. § 18-1305]. Both the person who accepted the bribe and the person who attempted to bribe such named persons were guilty of a felony. Idaho statutes provided no criminal sanctions in this area which were applicable to other types of fiduciaries such as guardians, lawyers, agents, directors, and the like, as does the Code. Persons holding themselves out as disinterested appraisers or critics also were not previously subject to any penalties for breach of their fiduciary duties.

9. Rigging Publicly Exhibited Contest

The Code provides that one commits a misdemeanor if he purposefully prevents, through the use of bribery, threatening of person, or tampering with animals and things, a publicly exhibited contest from being played by its established rules [Code 18-1410(1)]. The terms of the subsection are designed to include sporting events as well as other public contests, such as television quiz shows. About half the states have similar laws but such laws are primarily sports-oriented. Subsection (2) provides that both persons who solicit for benefit described in subsection (1), and persons who accept such benefits for rigging a contest, are offenders. Subsection (3) extends the sanctions to persons ordinarily classified as abettors, but who knowingly assist in deceiving the public.

Although several states have enacted legislation to preclude tampering with athletes and horses engaged in publicly exhibited contests, Idaho had not previously made even those activities subject to the criminal code.

10. Defrauding of Creditors

Persons who destroy, conceal, or transfer property subject to a security interest, with intent to hinder enforcement of that interest,

commit a misdemeanor [Code 18-1411]. This section attempts to provide for cases not within the scope of traditional theft, larceny and embezzlement in that "property of another" is not involved. Only fraud of secured creditors is here provided for but another section provides for fraud of the unsecured creditor pending insolvency.[116] Regardless of the value of the security interest in the property disposed of, the maximum grade of the offense is a misdemeanor.[117]

The prior Idaho law, former IDAHO CODE § 18-3706, differed substantially from the Code section in that only security agreements under the Uniform Commercial Code were covered and any intentional disposal of the secured property without the consent of the secured party was punishable as larceny. Therefore, the maximum penalty could have been fourteen years for disposing of one's own property if the security interest was over $150 [former I.C. § 18-4604]. The Code reduces the penalties because the offenders' actions are usually closer to social norms than those of outright thieves. It also requires the debtor's disposal to be "with purpose to hinder enforcement" of the security interest rather than just disposal without "consent" of the secured creditor, as in the former Idaho statute. Thus, one who casually sells his automobile, which is subject to a security interest, with every intention of making good his debt, but without the consent of the creditor, cannot be prosecuted under the Code section.

Code 18-1412 provides penalties for fraudulent disposition of assets where one knows that proceedings for appointment of a receiver have been initiated. Purposefully disposing of assets to defeat claims of creditors, and misrepresenting or refusing to disclose the existence of location of property to a receiver, is also punishable. Violation of the section is graded as a misdemeanor. This section deals only with disposing of property already obtained, whereas the obtaining of merchandise or credit by the use of false representations is punished more strictly in the theft provisions [*See* Code 18-1304].

The Idaho statutes previously made it a misdemeanor for any persons to be party to a fraudulent conveyance which was made with the intent to defraud any creditors [former I.C. § 18-3701]. Debtors who fraudulently removed or concealed property with the intent to defraud could get a maximum sentence of one year, a fine of $500, or both [former I.C. § 18-3702]. The same penalties were imposed upon any person against whom a judgment was pending or rendered who fraudulently attempted to hinder collection of that judgment [former I.C. § 18-3703].

[116] *See* IDAHO CODE § 18-1412.

[117] *Cf.* IDAHO CODE § 18-1302 where theft of an amount over $200 is felonious in Idaho.

11. Receiving Deposits in a Failing Financial Institution

Code 18-1413 provides that any person participating in the direction of a financial institution commits a misdemeanor if he permits the receipt of deposits knowing (1) that the institution is about to go into receivership or reorganization, and (2) the depositor is unaware of the impending situation of the institution. The defendant must know the institution is about to close rather than just know it may be insolvent, since premature closing to protect oneself from criminal sanctions may lead to the very disasters the section is trying to prevent. The section applies to all "financial institutions" as defined in Code 18-1301(2). Liability is limited to management personnel, since tellers and cashiers in such institutions are usually neither in a position to determine the financial status of the institution, nor able to control any management decisions.

Former Idaho statutes did not expressly provide for the situations that this Code section envisions. It may have been possible to get a conviction for such conduct under the terms of the statute on obtaining money by false pretenses.[118] Had the financial institution made a false written statement concerning its financial abilities, any director with knowledge could have been prosecuted under former IDAHO CODE § 18-3102. The maximum sentence under that section would have been one year or a fine of $1,000, or both, which coincides with the Code penalties for this offense.[119]

12. Misapplication of Entrusted Property and Property of Government or Financial Institution

The Code makes it an offense for any fiduciary entrusted with property of a private individual, government, or financial institution to dispose of that property in an unlawful or risky manner. If the amount involved exceeds $50, the offense is graded as a misdemeanor, otherwise it is a petty misdemeanor [Code 18-141]. The underlying purpose of this section is to punish unfounded speculation by fiduciaries. Commercial bailees are not within the scope of the section and proof of the offense requires that the defendant know his disposition would involve substantial risk of loss. In proposing this section the Reporter sought to reduce the harshness of existing penalties for misappropriation of entrusted funds by distinguishing between the non-fraudulent and the fraudulent.[120] Fraudulent misappropriations from which the defendant himself benefits are adequately provided for under the Code sections on theft. In this area, existing legislation either failed to distinguish between the two types or left the non-fraudulent type unpunished. It was thought that

[118] *See* former IDAHO CODE § 18-1301.
[119] *See* IDAHO CODE §§ 18-2207, 18-2203.
[120] *See* MODEL PENAL CODE § 206.40, Comments (Tent. Draft No. 2, 1954).

innocent speculation from which the fiduciary himself did not benefit, should not go unpunished, yet punishment for the intentional misappropriations was too harsh. Public officials and private fiduciaries such as trustees, guardians, and executors are treated similarly under this section.

Previously, Idaho would have treated both fraudulent and non-fraudulent misappropriations under the embezzlement statutes.[121] While each section requires a fraudulent appropriation, circumstantial evidence was sufficient to convict.[122] The Idaho statutes expressly provided for cases of embezzlement by public and corporate officers [former I.C. § 18-2402]; lessees and vendees of property [former I.C. § 18-2403]; carriers [former I.C. § 18-2404]; clerks, agents and servants [former I.C. § 18-2405]; trustees, bankers and fiduciaries [former I.C. § 18-2406]; and bailees, tenants and attorneys [former I.C. § 18-2407]. The Code 18-1414 limits the offense to fiduciaries only. The previous maximum sentence for embezzlement was ten years [former I.C. § 18-2413]. The Code provides theft penalties for fraudulent misappropriation [*see* Code 18-1303 and 18-1302(2)], but categorizes the non-fraudulent type as a misdemeanor or petty misdemeanor under Section 18-1414.

13. Securing Execution of Documents by Deception

It is a misdemeanor under Code 18-1415 for anyone to cause another, by use of deception, to execute any instrument affecting the pecuniary interest of any person. The section does not extend to non-pecuniary instruments, as they are dealt with in other sections of the Code. The theft section requires the "obtaining of property" which did not encompass certain forms of cheating. For example, the fraudulent securing of another's signature on a guarantee of indebtedness falls short of the provisions on theft by deception. The section does not include instruments executed because of threats, since the section on Criminal Coercion amply covers that offense [*See* Code 18-806].

Previous Idaho statutes dealt only with "obtaining property" by false pretenses and thus would not have provided for the situations envisioned by this section of the Code [*See* former I.C. § 18-3101].

IV. OFFENSES AGAINST THE FAMILY

A. Bigamy and Polygamy

While bigamy originated as an offense in the ecclesiastical courts, it is still prohibited throughout the United States as a crime with varying

[121] *See former* IDAHO CODE § 18-2401 *et seq.*

[122] *See* State v. Jester, 46 Idaho 561, 270 P. 529 (1928); State v. Smith, 48 Idaho 558, 283 P. 529 (1929).

degrees of punishment. The prohibitions on bigamy and polygamy seek to repress both antisocial conduct and deviate behavior contrary to the religions or mores of a majority of the people. At the same time, repression seeks to curtail desertion, nonsupport, and divorce, which are brought about from dividing one's time and money between two families.[123] Statutes usually apply to both fraudulent imposition and innocent but defiant practices of religious minorities. Other situations within the scope of bigamy arise when persons remarry after an invalid divorce, and where certain marriages may be prohibited by statutes, e.g., an adulteror marrying his paramour.

Under Code 18-1501, a married person is guilty of bigamy if he contracts another marriage unless (a) he believes his spouse is dead; or (b) he and the spouse have been living apart for five years and the spouse was not known to be alive; or (c) a court has terminated his marriage and he believes the decree to be valid; or (d) the actor believes he is legally eligible to remarry. Subsection (2) defines polygamy as marriage or cohabitation with more than one spouse at a time in purported exercise of the right of plural marriage. It expressly exempts foreign residents engaged in the lawful practices of their country while in transit through this state. Subsection (3) provides that a partner to a bigamous or polygamous marriage is also guilty of that offense if he knows the other is committing bigamy or polygamy. Under the Idaho adoption of the Model Penal Code, the grade of both crimes is misdemeanor, differing from the Official Draft's specification of felony for polygamy because of its nature as a continuing offense.

Although courts have often stated that no *mens rea* element is required in the proof of the crime of bigamy, the Code commentators pointed out that a court would not sustain the conviction of one, for example, who was drugged into a second marriage. The committee observed that the *mens rea* element goes basically to various forms of mistake, such as death of spouse, under which one might be influenced to commit the crime. Therefore, in detailing the various mistakes, the Code includes the *mens rea* element, the absence of which must be shown to assert the mistake as a valid defense.[124] Paragraph (c) is designed to give protection against the various problems with seemingly valid out-of-state divorces. Yet one who actually knows the decree is invalid commits bigamy upon entering a second marriage [Code 18-1501(1)(c)].

Polygamy is separately provided for in subsection (2), as it is a continuing offense lasting until all cohabitation and claim of marriage

[123] *See* MODEL PENAL CODE § 207.2, Comments (Tent. Draft No. 4, 1955).
[124] *Id.*

with all but one spouse is terminated. It also covers the situation where one marries several wives (or husbands) simultaneously.

Code 18-1501 also avoids the problem of "trigamy" as dealt with in *Lady Madison's Case.*[125] For example, X marries A, then marries B while A is alive, and still later after A's death marries C. For three hundred years it was held that the marriage to C was not bigamous because the previous marriage to B had been bigamous and thus void.[126] Since the Code speaks in terms of "contracting marriage" rather than "having a husband or wife," the void second marriage would not defeat prosecution for the third.

Prior Idaho statutes defined the offense of bigamy as a husband or wife marrying any other person [former I.C. § 18-1101], except when the spouse had been absent and believed dead for five years [former I.C. § 18-1102(1)], or a competent court had terminated the first marriage [former I.C. § 18-1102(2)]. Thus, a prosecution had fewer defenses than under the Code section. Polygamy was essentially the same, except the statute expressly provided for the same defenses as in bigamy [former I.C. § 18-1105]. Prosecution of foreign residents for practicing polygamy while temporarily within the state would have been possible under the prior statutes, regardless of the legality of the activity in their home country. As provided in former IDAHO CODE § 18-1104, any person who wilfully and knowingly married the husband or wife of another was subject to a fine of not more than $2,000, or imprisonment up to three years. The penalty was the same for bigamy [former I.C. § 18-1103], but for polygamy the court had discretion to select between two sentences. Former IDAHO CODE § 18-1105 provided for a fine of $200 and six months in the county jail, or a maximum term of five years imprisonment. Idaho's adoption of the Code reduces the sentence to one year, a fine of up to $1,000, or both, for both offenses, absent extenuating circumstances, since they are misdemeanors [Code 18-2207 and 18-2203].

B. Incest

The crime of incest, as developed from the ecclesiastical laws, prohibited either marriage or sexual intercourse with a person too closely related. Just what is "too close" varies widely among the states, with a few states even extending the offense to relationships outside the blood line to include in-laws as being "too closely related."[127] Modern legislation tries to confine itself to relationships which present a biological risk, or those which show abuse of parental influence.[128]

[125] 1 Hale P.C. 693.
[126] PERKINS, *supra* note 11, at 382.
[127] *Id.* at 383.
[128] *See* MODEL PENAL CODE § 207.3, Comments (Tent. Draft No. 4, 1955).

Code 18-1502 provides that a person is guilty of incest, a third degree felony, if he knowingly marries or cohabits, or has sexual intercourse with an ancestor or descendant, brother or sister of the whole or half blood, or an uncle, aunt, nephew, or niece of the whole blood. The section defines cohabit as living together under the appearance of being married, and refers to blood relationship without regard to legitimacy, and includes adoption.

The Code adds "cohabitation" to the traditionally prohibited acts of marriage and sexual intercourse mainly to facilitate proof of the offense. Adhering basically to the genetic basis for the section, the prohibited acts or relationships deal only with blood relatives, leaving the additional problems of legitimacy and adoption to civil regulation. Sexual intercourse, rather than marriage, between individuals related by law and not by blood is more properly a subject of adultery and fornication, which the Code has removed from the criminal sphere.

The prior Idaho statute, former IDAHO CODE § 18-6602, prohibited marriage, fornication, or adultery with a person within the degrees of consanguinity between which marriages are void. Those relationships which IDAHO CODE § 32-205 makes incestuous and void are substantially similar to those provided by the Code. There was no mention in former law of how a prohibited act between a parent and adoptive child would be treated; this is clarified in the Code. Incest under the former Idaho statute was a felony with a maximum sentence of ten years, while under the Code a normal maximum sentence would be seven years, a fine of up to $5,000, or both [Code 18-2205 and 18-2203].

C. Endangering Welfare and Nonsupport of Children

At common law a man had a duty to provide for his wife and child, and could even be convicted of murder or manslaughter if he knowingly neglected his duties which resulted in the death of his child.[129] Current legislation would punish any conduct which contributed to the delinquency, dependency, or neglect of the child. Allowing such things as truancy, association with criminal or immoral persons, wandering in streets at night, and visits to pool rooms and gambling halls, would be classified as contributing to delinquency. Even encouraging one's child not to salute the American flag was held punishable.[130]

The Model Penal Code has somewhat limited the types of conduct which are within the criminal sanctions to behavior which creates a known danger to the child's welfare. Code 18-1503 provides that a parent

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[129]PERKINS, *supra* note 11, at 604.
[130]*See* MODEL PENAL CODE § 207.13, Comments (Tent. Draft No. 9, 1959).

or guardian supervising the welfare of a child under eighteen commits a misdemeanor if he knowingly endangers the child's welfare by violating any duty of care, protection, or support. The committee in drafting this section has sought to avoid the problems apparent in attempting to penalize all acts contributing to delinquency. Although they recognize that prosecution of parents will usually not be a constructive solution, some sanctions are necessary in this area for gross breaches of duty. For example, abandonment which results in depriving the child of food and shelter would be criminal under this section. The section endeavors to promote the protection of the child's welfare, both mental and physical. The Code also takes cognizance of some religious practices, whereby some parents insist on treating ill children spiritually rather than with medical devices. Selecting spiritual means alone, in good faith, is not a violation of the duty to care for the child.

Nonsupport and desertion statutes typically penalize both the mother and the father for neglecting to provide the necessities of life for children within their care. Statutes often prescribe exemplary punishment and imprisonment for nonsupport, which militates against rehabilitation of the family situation. The Code attempts to confine the criminal offense of nonsupport to persistent failure to provide support which the accused knows he is legally obliged to provide.[131] Code 18-1504 provides that a person commits a misdemeanor if he fails to provide support which he can provide and which he knows he is legally obliged to provide to his children and spouse. By retaining a criminal sanction for nonsupport, the Code enables the public prosecutor to provide legal aid to indigent families where otherwise he might be unable to grant such aid. The section also reinforces the civil collection remedies.

The former Idaho statute dealt with desertion and nonsupport, and also provided for endangering the child's welfare in a limited sense [former I.C. § 18-401]. It stated that a person having the care of a child under sixteen, who deserted him with intent to abandon, or failed to furnish food, clothing, shelter, or medical attendance was guilty of a felony and punishable by a fine of not more than $500 or imprisonment not to exceed fourteen years, or both. The primary change in this area brought about by Idaho's adoption of the Code is to reduce the gravity of the offense from felony to misdemeanor. Of course, under grossly aggravated circumstances, the sentence can be increased as authorized by the sentencing provisions of Code 18-2304. Idaho also has the Uniform Reciprocal Enforcement of Support Act, IDAHO CODE § 7-1048 et seq., essentially a civil act which sets up a procedure for local residents

[131] *Id.*

to enforce support orders against an out-of-state defendant without criminal extradition.

V. SENTENCING AUTHORITY AND PROCEDURES

A. Former Law

Former Idaho law delineated the following as the forms of authorized punishment: 1) death, 2) imprisonment, 3) fine, 4) removal from office, and 5) disqualification to hold and enjoy an office of honor, trust, or profit [former I.C. § 18-109]. Although the statute itself usually determined the appropriate penalty, the Idaho court typically had been allowed considerable discretion. For example, former IDAHO CODE § 18-106 imposed a duty upon the courts to prescribe punishment in accord with the directive contained in the statutes. Nevertheless, with the enactment of former IDAHO CODE § 18-2513, the courts were empowered to sentence those convicted of a felony for an indeterminate time period. This permitted the courts to set sentence without a definite time limitation. To this extent IDAHO CODE § 18-106 was repealed.[132] A noteworthy limitation in former IDAHO CODE § 18-2513 was the requirement that a maximum sentence be set "for a period of not less than two (2) years nor exceeding that provided by law."

Another power of the court was that conferred under former IDAHO CODE § 18-111. This statute authorized the court to enter the conviction of a felony as a "misdemeanor" on the defendant's criminal record in certain cases. These special circumstances existed when a statute permitted substitution of a county jail term, a fine, or both, in lieu of imprisonment in the state penitentiary. Where sentences of the former type were employed and where the statute provided for such an alternative, the court was given complete discretion. Otherwise, the crime was given the status indicated by the nature of the punishment that could or should have been imposed.[133]

The power to make modifications following the actual conviction was granted under former IDAHO CODE § 19-2601. Pursuant to this section the Idaho courts could:

1) Commute the sentence and confine the defendant to the county jail, or, where the defendant was of the proper age, confine him to the State Rehabilitation Center;

[132] *See* In Re Erickson, 44 Idaho 713, 260 P. 160 (1927).
[133] *See* State v. O'Dell, 71 Idaho 64, 225 P.2d 1020 (1950).

2) Withhold judgment and place the defendant on probation; or
3) Suspend the execution of a judgment within the first 60 days or at any time during the term if the sentence was to a term in the county jail (A probation period was also necessary under this alternative.).

The only restriction on the application of this section was its inapplicability to cases involving murder or treason.

B. The Code

The sentencing alternatives available under the Code commence in Code 18-2202 and are expanded and modified by other sections in Chapters 22 and 23. Basically, they are an elaboration on those provided under the former code. The significant modification of the Code, in addition to the new classification scheme, is the incorporation of specific criteria with which to assist the courts in selecting the form of punishment which will best benefit society and the individual offender. The ultimate objective is to provide the courts with flexibility.

1. Sentencing -- Ordinary Terms

As noted previously, the various offenses under the Code are classified as felonies, misdemeanors, petty misdemeanors, or violations [Code 18-104]. Felonies are further classified as felonies of the first, second or third degree. A felony is that of the first or second degree only when so enumerated in the statute. Otherwise it is a felony of the third degree [Code 18-2201]. Where a felony is declared by some Idaho statute other than the Code, without specification of degree, it is considered to be a felony of the third degree. This is true with regard to any statute not repealed by the Code, or for those to be later enacted [Code 18-2201(2)].

The appropriate disposition of an offense is generally based upon the Code classification scheme. Therefore, the quantity of punishment will in part depend upon the seriousness of the crime as defined by the legislature. However, it is the goal of the Code to eliminate the distribution of crimes into narrow categories which serve to impede the administration of justice. The authors of the Model Penal Code concluded that a code structure providing for indeterminate prison sentences with a substantial range between the maximum and minimum term would help accomplish this goal. Idaho legislators concurred in this view but raised slightly the maximum penalties and gave the courts full discretion in determining minimum sentencing periods. The following table illustrates the maximum period of fine and imprisonment applicable in Idaho under ordinary circumstances:[134]

[134] *See* CODE §§ 18-2202, 18-2203, 18-2205, 18-2207.

Offense	Max. Fine	Max. Imprisonment
Felony, First Degree	$10,000	Life
Felony, Second Degree	10,000	15 years
Felony, Third Degree	5,000	7 years
Misdemeanor	1,000	1 year
Petty Misdemeanor	500	30 days
Violation	500	0

It should be noted that a "violation" is considered an offense for which no sentence other than a fine, fine and forfeiture, or other civil penalty is authorized upon conviction. This reflects the philosophy of the Code in utilizing penal sanctions only when the conduct warrants the social condemnation inherent in the concept of "crime." A violation is not a crime.

Fines are authorized under Code 18-2203. In addition to the above maximums, this section states that a higher fine is permitted to an amount equal to double the pecuniary gain derived from any particular offense. Any statute having a higher maximum fine will also pre-empt the provisions of 18-2203.

The criteria for imposing fines are governed by Code 18-2302. This section restricts the court to some extent. For instance, where any other disposition is authorized by law, a fine is not sanctioned unless the court is convinced that the implementation of a fine alone will serve to protect the public. Limitations are also placed on the imposition of fines to insure that the fine will serve both the deterrent and correctional objective. It is necessary that the defendant be able to pay the fine and that he will not be rendered incapable of making civil restitution or reparation to the victim of the crime. Installment payments are authorized, but the court is instructed to make full inquiry into the financial resources of the defendant in order to determine his ability to pay. In no case will a defendant be sentenced to pay a fine in addition to a sentence of imprisonment or probation unless the court is convinced that the fine will deter further criminal activity, or unless the crime resulted in a pecuniary gain for the offender.

2. Sentencing—Extended Terms

Precedent for the imposition of extended terms is found in IDAHO CODE § 19-2514, which the legislature did not repeal. It is provided therein that "persistent violators," meaning those persons convicted for the third time of a felony, could be sentenced for an additional period ranging from five years to life imprisonment. This was not considered a separate crime, but merely rendered a person liable to imprisonment for

a term in excess of that which might have been inflicted upon him had he not been twice previously convicted.[135]

The Code expands this concept by providing that special circumstances will result in the imposition of extended terms of imprisonment for all categories of crimes, not just for felonies. Its method is the declaration of certain categories of offenders followed by a specific declaration of those circumstances which will result in the imposition of extended terms. The following outline summarizes these conditions:

Category	Code Section	Requirements
Persistent Offender	18-2303(1)	1) Defendant over age of 21 2) Convicted of 2 felonies or 1 felony and 2 misdemeanors 3) Crimes committed at different times since age 18.
Felonies:		
Professional Criminal	18-2303(2)	1) Defendant over age of 21 2) Has knowingly devoted himself to criminal activity as a major source of his livelihood. 3) Has substantial income or resources not explained to be derived from other sources.
Dangerous, Mentally Abnormal Person	18-2303(3)	1) Defendant's abnormal condition is confirmed by psychiatric examination. 2) Defendant's criminal conduct is characterized by a pattern of repetitive, compulsive or persistent agressive behavior with heedless indifference to consequences. 3) Defendant represents a serious danger to others.
Multiple Offender	18-2303(4)	1) Sentenced for 2 or more felonies or already under sentence for a felony and the sentences run concurrently under Code 18-2306. or 2) Defendant admits to commission of one or more felonies in open court and asks that they be taken into account in sentencing. and 3) The maximum authorized sentence for Defendant's crimes would exceed in length the

[135]*See* State v. Johnson, 86 Idaho 51, 383 P.2d 326 (1963).

		maximum of the extended term imposed.
Misdemeanors and Petty Misdemeanors:		
Persistent Offender	18-2304(1)	1) Previous conviction for 2 crimes. 2) Crimes committed at different times since age 18.
Professional Criminal	18-2304(2)	(Same as for Felony)
Chronic Alcoholic, Narcotic Addict, or Person of Abnormal Mental Condition	18-2304(3)	1) Defendant requires rehabilitative treatment. 2) Treatment required for a substantial period of time.
Multiple Offender	18-2304(4)	1) Defendant sentenced for "a number" of misdemeanors or petty misdemeanors, or 2) Defendant admits in open court to the commission of one or more misdemeanors and asks that they be taken into account in sentencing. and 3) The maximum authorized sentence for each of Defendant's crimes if made to run consecutively would exceed in length the maximum period of the extended term imposed.

The authorized increase resulting from the imposition of an extended term is substantial. In the case of a felony of the second degree it means an increase of 15 years. And in the case of a felony of the third degree a maximum increase of an additional 8 years [*See* Code 18-2206]. A misdemeanor carries a maximum of 3 years and a petty misdemeanor carries a maximum of 2 years with the imposition of an extended term [*See* Code 18-2208].

One point of interest is the failure to repeal the persistent violator provisions of IDAHO CODE § 19-2514 referred to above. It would appear that the Code provisions would include this statute within the scope of its purpose, especially since the statute is construed as not creating a separate statutory offense. However, since that statute is dependent upon the conviction of three felonies, it arguably may be interpreted as providing an "extended" extended term for that situation.

C. Sentencing Procedure

A basic ingredient of the Code sections relating to sentencing procedures is the requirement that the court conduct a pre-sentencing

investigation and report [Code 18-2307]. This is necessary in all cases where a felony has been committed, where the convicted person is under the age of 22,[136] or when the defendant will be placed on probation or sentenced to an extended term. Otherwise, it is optional. Included in the report is an inquiry into the circumstances surrounding the commission of the crime, the defendant's criminal record, his physical and mental condition, family life, economic status, education, occupation, and personal habits. Provision for placement of the convicted individual under psychiatric examination for a period not exceeding 60 days is authorized if the court deems it necessary. All facts and conclusions are then open for examination and can be controverted by the defendant. In cases involving the imposition of an extended term, both hearing and notice are required [Code 18-2307]. It should also be noted that the pre-sentence investigation report is required to be shown to the defendant or his attorney [Code 18-2307(5)].

The pre-sentence investigation and report will then form the nucleus of further treatment of the convicted. For instance, Code 18-2201 states that should the court feel it unduly harsh to sentence a convicted felon in accordance with the Code, the Court is permitted to enter judgment for a lesser degree of felony or for a misdemeanor. Sentence may even be withheld and a period of probation substituted where it appears to the Court that the individual presents neither a further danger to the public nor is in need of correctional treatment. Examination of the circumstances which may warrant a withholding of a sentence of imprisonment is required. These are enumerated in Code 18-2301, but note that the Code does not require that the occurrence of such circumstances result in the withholding of sentence. Thus, the pre-sentence investigation and report assumes a valuable role in the determination of whether an individual should be fined, imprisoned, placed on probation, given a suspended sentence, or subjected to some of the other alternatives mentioned herein. A copy of this report is then transmitted to the State Board of Correction or other appropriate institution. Code 18-2301(2) could result in a fairly substantial change in the tone of sentencing in Idaho because of its apparent presumption against imprisonment. Whether such change comes into being is dependent upon the reception these liberal sentencing standards will receive from the judges of the state. It is to be observed that these sentencing provisions contain much built-in flexibility.

The place of imprisonment for a person sentenced for an indefinite

[136]It is most likely that this provision will be amended. As it now stands any person under the age of 22 who commits a traffic offense would be the subject of a pre-sentence investigation. Presumably such a report would not be of value unless the crime was in the nature of a felony, or possibly a misdemeanor.

term with a maximum in excess of one year is under the control of the State Board of Correction [Code 18-2209]. Presumably, this will be the state penitentiary. It should be noted that the Idaho legislature initially did not choose to adopt M.P.C. § 7.08, which provided for a 90-day commitment period during which those convicted of a felony or misdemeanor could be placed under "observation and study" at an appropriate facility. This same draft would have given the State Board of Correction a role in determining further disposition of the offender. However, a 1972 amendment presumably will cure this defect and provide for a 120-day commitment period.

Civil commitment in lieu of prosecution is authorized in Code 18-2202 and implemented by Code 18-2211. It provides that when a person prosecuted for a felony of the third degree, misdemeanor, or petty misdemeanor, is a chronic alcoholic, narcotic addict or person suffering from mental abnormality, that person may be committed to a civil institution for treatment when the Court is authorized to make such a disposition. The district courts presently have such jurisdiction [former I.C. § 19-3301 *et seq.*] Treatment may be in the form of medical, psychiatric or other rehabilitative measures and may be either in a hospital or other rehabilitative institution as the Court may direct. The prosecution is dismissed upon such an order of commitment and should it be made after a conviction, the Court may set aside the verdict and judgment and dismiss the prosecution [Code 18-2211].

Treatment of Idaho juvenile offenders is not included in the statutory enactment of the Code, even though Model Penal Code § 6.05 sets forth specialized treatment. Instead, the provisions of Idaho's Youth Rehabilitation Act [I.C. §§ 16-1801-1845 (1963)] will be followed. However, note that Code 18-410 provides that a child less than fourteen years of age at the time of the conduct charged to constitute the offense cannot be convicted. A child between the ages of fourteen and seventeen is not subject to prosecution unless the juvenile court has no jurisdiction or has waived jurisdiction and consented to the institution of criminal proceedings.

D. Sentencing for Murder

At common law the attempt was made to delineate criminal homicides into crimes of two catgories, murder or manslaughter. The former was broadly defined and was a capital offense, while the latter was narrowly defined. This classification was rejected at an early date in this country. Substituted in its place was a division of murder into two degrees, the first degree of which consisted of some elements of premeditation, deliberation or attempted felonious conduct [former I.C. §

18-4003]. Only murder of the first degree was subject to the death penalty. Murder of the second degree was instead punishable by imprisonment from a period ranging from ten years to life. In Idaho it was the jury who made the determination of guilt or innocence on a plea of not guilty. A sentence recommendation was included in the verdict [*See* former I.C. § 18-4004]. A judgment finding the defendant guilty and affixing the death penalty was then subject to the final approval of the appellate courts.[137] Where a jury failed to decide punishment, it was the responsibility of the Court to do so.[138]

The approach of the Code in abolishing the degrees of murder still involves a consideration of the circumstances which would aggravate matters, or tend to result in the imposition of the death penalty:

a) the murder was committed by a convict under sentence of imprisonment;

b) the defendant was previously convicted of another murder or of a felony involving the use of threat of violence to the person;

c) at the time the murder was committed the defendant also committed another murder;

d) The defendant knowingly created a great risk of death to many persons;

e) the murder was committed while the defendant was engaged [sic] or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping;

f) the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody;

g) the murder was committed for pecuniary gain;

h) the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

[Code 18-607(3)].

It is also necessary to consider these factors which may render the homicide less severe in the eyes of the law. Such mitigating circumstances are:

a) the defendant has no significant history of prior criminal activity;

b) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

[137]*See* State v. Ramirez, 34 Idaho 623, 203 P. 279 (1927).
[138]*See* State v. Hoagland, 39 Idaho 405, 228 P. 314 (1924).

c) the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act;

d) the murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct;

e) the defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor;

f) the defendant acted under duress or under the domination of another person;

g) at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;

h) the youth of the defendant at the time of the crime.

[Code 18-607(4)].

It is the responsibility of the court to evaluate these considerations and determine whether punishment for a felony of the first degree should be imposed. Code 18-607(1) is specific as to the situations in which the Court should resort to this alternative. However, where a consideration of the death penalty is involved, it is the duty of both the Court and jury to evaluate the circumstances before determination of such sentence can be made. Code 18-607(2) authorizes a proceeding in which the rules of evidence are relaxed and full inquiry is made into any matters relevant to the choice of sentence. The issue is then decided by the jury and must be concurred in by the judge in order for the death penalty to be invoked. If the jury is unable to reach a unanimous verdict, the jury is to be dismissed and a sentence for a felony of the first degree (non-capital) must be imposed.

Note that the determination of guilt or innocence of murder is made at a separate hearing from that in which the particular penalty is decided under Code 18-607(2). This procedure is sometimes called a "bifurcated trial." This hopefully will make it possible for the jury to concentrate on the facts of the case without dwelling on the emotional consequences that may result from a determination of those facts. Usually, the jury members present in the general trial will determine the sentence, but there is a provision in Code 18-607(2) for the empanelling of a new jury to determine sentence when good cause is demonstrated to the Court. In those cases where the defendant was tried before a judge alone, or where the prosecuting attorney and the defendant waived the right to a jury to determine sentence, the matter is left solely to the decision of the Court. It is assumed that existing case law subjecting any determination of the trial court to appellate review will stand.

CONCLUSION

While the foregoing material has obviously not been all encompassing in its discussion of the Model Penal Code as a "model" for criminal law reform in Idaho, it is hoped that some assistance has been provided in evaluating its basic policies and objectives. Paginal limitations have necessarily prohibited more than casual reference to those "General Provisions" of Chapters 1-5 of the Code. A further reading of these sections should provide additional insight into how the new Code would be administered. Particular notice should be given that portion of the Code dealing with "Responsibility" (Chapter 4) and the included considerations inherent in evaluating criminal intent. Likewise, principles regarding "Justification" (Chapter 3) and incomplete criminal acts (Chapter 5) should be examined. Finally, it should be noted that those sections of the Code relating to methods of prosecution, sentencing and correction have been given little or no discussion in this article. All of these areas are worthy of careful examination as time and situation warrant.

As with any legislation of a controversial nature, it is normal for legislators as well as citizens to come to their own conclusions as to whether a particular body of legislation, or a particular statute, will contribute to a better state of affairs within this jurisdiction. With this in mind, it is suggested that three factors must be stressed. First, it should be expected that any attempt at reorganization of an area of the law will result in some initial problems in administration. However, as time and experience allow for adjustment, such a concern should be dismissed. The second factor to remember is that the Model Penal Code was not an overnight effort, but is the product of more than ten years of concentrated effort by perhaps the most renowned panel of "experts" ever assembled by the American Law Institute. To dismiss their suggestions without thoughtful consideration is an error in judgment, but to categorize the Model Penal Code as the ultimate in penal reform for this state is equal error. What is presented is but a "model" for reform. Finally, to those who suggest that the adoption of a new criminal code will abolish long lines of historical and legal precedent, let it be said that a new code is but a culmination of man's total experience in dealing with criminal conduct. As this article has attempted to illustrate, it was the common law that formed the foundation for the initial enactment of Idaho's criminal statutes, and any legislation which succeeds in the revision of these statutes, must rely on the precedent and experience of the past. Thus, the Idaho courts will have to aid in the application of a new code, but in so doing they too will be relying on past experience.

In conclusion, the Model Penal Code offers many things for Idaho

and its citizens. Indeed to the bench and bar, and to the legislature, it presents a challenge, but to the state as a whole it represents an opportunity to take the lead in accomplishing badly needed criminal reform. As for the criminal, let the epilogue to the ancient code of Hammurabi govern his thoughts:

> "(Let any oppressed man) . . . read the inscription on my monument! Let him give heed to my weighty words! And may my monument enlighten him as to his cause and may he understand his case! . . ."[139]

[139]R. F. Harper, *The Code of Hammurabi* (Chicago: University of Chicago Press), p. 101.